82-1453

No.

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In The

Supreme Court of the United States

October Term, 1982

ERNEST BADARACCO, SR. and ROSE BADARACCO, ERNEST BADARACCO, JR. and BARBARA BADARACCO,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether Section 6501(c)(1), I.R.C. 1954, providing for an unlimited period for assessment, is the governing statute when subsequent to the filing of a document purporting to be an original return, but which at a later date is determined by the Commissioner to be fraudulent, there is filed an amended return which is in all respects non-fraudulent; or, whether the non-fraudulent return commences the running of the three year statute of limitations, as to such a return, as provided by Section 6501(a), I.R.C. 1954.

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No.

In The

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ERNEST BADARACCO, Sr. and ROSE BADARACCO, ERNEST BADARACCO, Jr. and BARBARA BADARACCO,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals, which is not yet officially reported, is annexed hereto in Appendix C. The opinion of the United States Tax Court, reported as T.C. Memo 1981-404, is annexed hereto in Appendix D.

JURISDICTION

The judgment of the Court of Appeals, annexed hereto in Appendix B, was entered on November 29, 1982. A petition for

rehearing en banc was denied on December 20, 1982. A copy of the order of denial is annexed hereto as Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 6501, I.R.C. of 1954 as amended:

> (a) [as amended by Sec. 165(a), Excise Tax Technical Changes Act of 1958, Pub. L. No. 85-859, 72 Stat. 1275] *General Rule.*—Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.
>
> • • •
>
> (c) *Exceptions.*—
>
> (1) *False return.*—In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

Section 6653, I.R.C. of 1954 as amended:

> (b) [as amended by Sec. 19(d), Revenue Act of 1962, Pub. L. No. 97-834, 76 Stat. 960, and by Sec. 313(e)(2)(B), Health Insurance for the Aged

Act, Pub. L. No. 89-97, 79 Stat. 290] *Fraud*—If any part of the underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. In the case of income taxes and gift taxes, this amount shall be in lieu of any amount determined under subsection (a). In the case of a joint return under section 6013, this subsection shall not apply with respect to the tax of a spouse unless some part of the underpayment is due to the fraud of such spouse.

STATEMENT

These cases arose as a result of petitions which were filed by the taxpayers in the United States Tax Court from statutory notices issued by the Commissioner of Internal Revenue. Jurisdiction of the Tax Court is based upon Section 6213, I.R.C. of 1954.

The facts of the cases are undisputed having been fully stipulated in the record before the Tax Court. The relevant facts are as follows:

The taxpayers had filed timely federal income tax returns for each of their taxable years 1965 to 1967. The return for the taxable year 1968 was filed on May 28, 1969. On August 17, 1971 they filed "amended" returns revealing increases in reportable distributable partnership income over the amounts shown on the original returns. The additional taxes shown on the "amended" returns were paid with the filing. The Commissioner assessed the additional tax. As a result there was no deficiency or payment in tax with respect to the "amended" returns.

On November 21, 1977, more than six years after the amended returns were filed, the Commissioner issued statutory notices proposing the assessment of the addition to the tax under Section 6653(b), I.R.C. 1954. Taxpayers filed timely appeals with the United States Tax Court.

The cases were submitted to the Tax Court, Judge Parker presiding. The sole issue for decision was the interrelationship of subsections (a) and (c)(1) of Section 6501, I.R.C. of 1954, when a non-fraudulent return is filed subsequent to a purported return which is at a later date determined by the Commissioner to be fraudulent in nature. One of the stipulations filed by the parties was a concession on behalf of the taxpayers that the purported original returns were fraudulent in nature. The relevant positions of the Commissioner and the taxpayers were that the Commissioner contended that the filing of a non-fraudulent return has no effect upon the application of Section 6501(c)(1), *supra*, which provides for an unlimited period of assessment; the taxpayers contended that the filing of a non-fraudulent return invokes the operation of the three year period of limitations under Section 6501(a), *supra*, as to said non-fraudulent return. A proposed assessment therefore later than three years after the filing of a non-fraudulent return would be time barred.

After the petitions had been filed, and before the cases were submitted for trial, the Court of Appeals for the Tenth Circuit rendered its opinion in *Dowell v. Commissioner*, 614 F. 2d 1263, 80-1 USTC para. 9216 (10th Cir. 1980). The *Dowell* case concerned this specific issue. The decision of the Tenth Circuit reversed a decision of the Tax Court, 68 T.C. 646 (1977). The Tax Court in *Dowell* had held in favor of the position advocated by the Commissioner. In reversing, the Tenth Circuit decided in favor of the position advocated by the taxpayer.

The taxpayers in the instant cases relied upon the precedent established by the Tenth Circuit. At the same time that the instant cases were being reviewed by the Tax Court, the Court was also reviewing the issue in another case, and on the same day it rendered its decisions in both the instant cases and in *Klemp v. Commissioner,* 77 T.C. 201 (1981), on appeal (9th Cir. No. 81-7744), holding in favor of the taxpayers. The opinion in the instant cases merely follows the opinion in *Klemp, supra,* annexed hereto in Exhibit E. It is therefore necessary to refer to that opinion in evaluating the Tax Court's reasoning which reversed its previous holding in *Dowell, supra,* and followed the analysis of the Tenth Circuit in the reversal of *Dowell, supra.* The Commissioner filed an appeal with the Third Circuit, which reversed the decision of the Tax Court.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals has promulgated an opinion which is in direct conflict with decisions of the Tenth and Second Circuits.

We have observed that this issue was initially the subject of opinions by the Tax Court and the Tenth Circuit. Subsequent to these decisions the issue has also been decided in favor of the taxpayer in *Britton v. United States,* 532 F. Supp. 275, 81-2 USTC para. 9739 (D. Vt. 1981). This District Court decision has been affirmed by the Second Judicial Circuit without opinion (2d Cir. April 15, 1982).

A companion case to these cases in the Third Circuit, and decided in the same opinion, is *Deleet Merchandising Corp. v. United States.* This case was decided in favor of the taxpayer by the District Court for the District of New Jersey cited at 535 F.

Supp. 402, 82-1 USTC para. 9184 (D.N.J. 1981), *rev.* (3rd Cir. Nov. 29, 1982).

The United States Tax Court has followed its opinion in the *Klemp, supra,* case in a line of subsequent cases. *See Espinoza v. Commissioner,* 78 T.C. 412 (1982); *Kramer v. Commissioner,* T.C. Memo 1982-308, 44 T.C.M. 42; *Nesmith v. Commissioner,* T.C. Memo 1982-56, 42 T.C.M. 1269, on appeal (5th Cir. No. 82-4162); *Galvin v. Commissioner,* T.C. Memo 1982-689.

The issue of the statute of limitations is always of prime importance in the administration of law. Any decision which has as its result an influence which is contrary to opinions or holdings in other circuits, and in the lower courts, should be reviewed by this Court in order to resolve the conflict, and afford consistency between circuits.

II.

These cases present an important question with respect to the administration of federal tax law which should be resolved by this Court.

In addition to presenting a matter of a conflict between circuits, the subject opinion of the Third Circuit involves the important question as to the interpretation of statutory provisions of the Internal Revenue Code relating to the applicability of the statute of limitations.

The opinion of the Third Circuit was divided two to one. The division of the panel exhibits a dichotomy of inquiry into the standard to be employed when searching into the statutory scheme of Section 6501, *supra,* specifically the interrelationship between subsections (a) and (c)(1). The position of the majority is that Section 6501(c)(1), *supra* is "clear upon its face", and

because there is "nothing" in the Code, legislative history or the Commissioner's regulations to indicate that the filing of an amended return has any impact upon subsection (c)(1) then said subsection is controlling. The dissent postulates that merely reading the literal words of the statute does not end the inquiry into the statutory scheme; that if there are persuasive considerations for examining beyond the literal wording, then further inquiry should be made. The dissenting opinion cites in support thereof the decision of this Court in *Watt v. Alaska,* 451 U.S. 259, 266 (Sup. Ct. 1981) and cases cited therein. The dissenting judge identifies the critical inquiry as not being the clarity of the literal words of the statute when the situation involves the filing of an original return which is determined to be fraudulent, but rather the *lack of clarity* when the situation involved is the subsequent filing of a non-fraudulent amended return. It is because of this lack of clarity, the dissent argues, that the inquiry should go beyond the literal words of the statute. In support of his position the dissenting judge identifies "sufficient persuasive evidence", as suggested by the *Watt v. Alaska, supra,* case. He also recognized that the *Dowell, supra,* case presented a reasonable alternative interpretation of the statute. Except to state that it disagreed with the Tenth Circuit the majority holding does not give consideration to or analysis of the *Dowell, supra,* case. The Tenth Circuit indulged in an analysis of the legislative history of the pertinent statute, and interpreted such in the light of congressional intent. This was not analyzed by the majority.

The decision of the Third Circuit therefore, presents an important inquiry with respect to statutory construction of vital administrative provisions of the Internal Revenue Code; which together with the conflict between sister circuits suggests that the decision should be reviewed by this Court.

CONCLUSION

For the above reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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& FRADKIN
Attorneys for Petitioners

APPENDIX A — SUR PETITION FOR REHEARING *EN BANC* OF UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IN *BADARACCO v. COMMISSIONER OF INTERNAL REVENUE*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-3033

ERNEST BADARACCO, SR., et al. v. COMMISSIONER OF INTERNAL REVENUE, ERNEST BADARACCO, JR., et al. v. COMMISSIONER OF INTERNAL REVENUE,

Respondent

(T.C. Docket Nos. 1700-78 & 1701-78)

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*.

The petition for rehearing filed by Petitioners in the above entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

Dated: Dec 20, 1982

By the Court,

s/ Art M. Adams
Circuit Judge

APPENDIX B — JUDGMENT OF UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-3033

ERNEST BADARACCO, SR., AND ROSE BADARACCO

vs.

COMMISSIONER OF INTERNAL REVENUE
(T.C. No. Docket No. 1700-78)
ERNEST BADARACCO, JR. AND BARBARA BADARACCO

vs.

COMMISSIONER OF INTERNAL REVENUE
(T.C. Docket No. 1701-78)
Commissioner of Internal Revenue,
Appellant in No. 81-3033

(T.C. Nos 1700-78 & 1701-78)

No. 82-5171

DELEET MERCHANDISING CORP.

vs.

THE UNITED STATES OF AMERICA,
Appellant in No. 82-5171

(D.C. Civ. No. 80-00026)

Appendix B

ON APPEAL FROM THE UNITED STATES
TAX COURT and THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: ADAMS, HUNTER and BECKER, *Circuit Judges*

These causes came to be heard on the records from the United States Tax Court and the United States District Court for the District of New Jersey and were argued by counsel September 16, 1982.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Tax Court entered August 11, 1981, and the judgment of the said District Court, entered December 23, 1981, be and the same are hereby reversed and the causes remanded to the said Courts for further proceedings in accordance with the opinion of this Court.

ATTEST:

s/ Sally Muros
Clerk

Certified as a true copy and issued in lieu of formal mandate as to No. 81-3033 on December 28, 1982.
Test: M. Elizabeth Ferguson

Chief Deputy Clerk, U.S. Court of
Appeals for the Third Circuit

November 29, 1982

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-3033 and 82-5171

ERNEST BADARACCO, SR. and ROSE BADARACCO,
ERNEST BADARACCO, JR. and
BARBARA BADARACCO,

v.

COMMISSIONER OF INTERNAL REVENUE,
Appellant in No. 81-3033

ON APPEAL FROM THE UNITED STATES TAX COURT

Docket Entries Nos. 1700-78 and 1701-78

DELEET MERCHANDISING CORP.

v.

UNITED STATES OF AMERICA,
Appellant in No. 82-5171

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

C.A. No. 80-00026

Argued September 16, 1982

Before: ADAMS, HUNTER and BECKER, *Circuit Judges*

(Filed November 29, 1982)

Appendix C

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Appendix C

OPINION OF THE COURT

ADAMS, *Circuit Judge*.

These two appeals[1] concern the effect of filing nonfraudulent, amended income tax returns, subsequent to the filing of fraudulent original returns, on the statute of limitations provisions of 26 U.S.C. §6501.[2]

I.

The facts in each proceeding are undisputed.[3] In the first case, Ernest Badaracco, Sr. and Ernest Badaracco, Jr. were equal partners in an electrical contracting business, Badaracco Brothers and Company. They

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1. These cases were not consolidated. They were, however, argued together and contain no relevant differences of fact. We will, therefore, discuss them in a single opinion.

2. 26 U.S.C. §6501 provides in relevant part:

> (a) Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.
>
> . . .
>
> (c) Exceptions.
>
> (1) False return. In the case of a false return or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

3. Deleet Merchandising Corporation denies any fraud on its part in the preparation of its income tax returns. The district court, however, assumed that the original returns were fraudulent for the purposes of the summary judgment motion, and we must make the same assumption in deciding the appeal from that decision.

filed individual and partnership returns for the years 1965 to 1969, which fraudulently understated their taxable income. After federal grand juries subpoenaed the partnership's books and records, the taxpayers, on August 17, 1971, filed amended returns for each of the years in question. Three months later, on November 17, 1971, the Badaraccos were indicted on fifteen counts under 26 U.S.C. §7206(1) for filing false and fraudulent income tax returns for the years 1965 to 1969. They each entered a plea of guilty to the charge of filing a false and fraudulent partnership tax return for 1967, and the district court entered a judgment of conviction on June 6, 1973. *United States v. Badaracco*, (N.J. Crim. No. 766-71). The remaining counts of the indictment were dismissed. Four and one-half years after the conviction, the Commissioner of Internal Revenue issued deficiency notices for each of the five years in question. The Badaraccos asserted that the Commissioner's action was time-barred by 26 U.S.C. §6501(a), because more than three years had passed since the filing of their non-fraudulent, amended returns. The Tax Court agreed, and the Commissioner appealed to this Court.

In the second case, Deleet Merchandising Corporation ("Deleet") filed timely corporate income tax returns for the years 1967 and 1968. Amended returns for these years were then filed on August 9, 1973. Following lengthy criminal and civil investigations, the Internal Revenue Service ("I.R.S.") issued a notice of deficiency to Deleet on December 14, 1979 for the years 1967 and 1968. The taxpayer paid the deficiencies and penalties assessed on or about December 27, 1979, and then filed a complaint in district court to recover those monies. On December 14, 1981, Deleet moved for summary judgment on the ground that even if the original returns had been fraudulent, the deficiencies and penalties could not be assessed more than three years after the filing of a non-fraudulent amended return. The district court granted the motion and the Commissioner appealed.

Appendix C

II.

To support their claims that the three year statute of limitations has run, the taxpayers rely principally on *Dowell v. Commissioner*, 614 F.2d 1263 (10th Cir. 1980), and the cases which have followed it. *Britton v. U.S.*, 532 F. Supp. 275 (D. Vt. 1981), *aff'd without opinion* (2d Cir. April 15, 1982); *Klemp v. Commissioner*, 77 T.C. 201 (1981), on appeal (9th Cir. No. 81-7744); *see also, Espinoza v. Commissioner*, 78 T.C. 412 (1982); *Kramer v. Commissioner*, 44 T.C.M. (CCH) 42 (1982); *Elliott Liroff v. Commissioner*, 44 T.C.M. (CCH) 42 (1982); *Deyel v. Commissioner*, 44 T.C.M. (CCH) 45 (1982); *Richard B. Liroff v. Commissioner*, 44 T.C.M. (CCH) 47 (1982); *Nesmith v. Commissioner*, 42 T.C.M. (CCH) 1269 (1981); *appeal docketed*, No. 82-4162 (5th Cir. April 29, 1982) (all following *Klemp*). The *Dowell* court held that a fraudulent return was in effect no return at all, because the taxpayer had failed to evince "an honest and genuine effort to satisfy the law" within the meaning of *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172 (1934), and *John D. Alkire Inv. Co. v. Nicholas*, 114 F.2d 607 (10th Cir. 1940).[4] It then reasoned that the fil-

4. *Zellerbach Paper* presented essentially the opposite of the problem posed by this case. A taxpayer filed a non-fraudulent return. Subsequent to the filing of that return, Congress passed the Revenue Act of 1921 which applied retroactively and had a *de minimis* effect on the tax liability of the company. After the limitations period had run, the government attempted to assess large deficiencies, on grounds unrelated to the 1921 Act, on the theory that the failure to file an amended return rendered the original return a nullity and tolled the statute of limitations. The Supreme Court rejected the argument, noting that where a return purported to be a return and evinced an honest and genuine endeavor to satisfy the law it would not be treated as a nullity because of inaccuracies or omissions. "Supplement and correction in such circumstances *will not take* from a taxpayer, *free from personal fault*, the protection of a term of limitation *already running for his benefit*." Zellerbach Paper Co. v. Helvering, 293 U.S. 172, 180 (1934) (emphasis added). Nothing in the opinion suggests that a culpable taxpayer, who files a fraudulent return with the intent to evade tax, renders the original fraudulent return a nullity for the purpose of the statute of limitations, by filing an amended return.

ing of a non-fraudulent, amended return subsequent to the filing of a false and fraudulent original return would have exactly the same effect as the filing of a late original return following the fraudulent failure to file any return at all. Because in *Bennett v. Commissioner*, 30 T.C. 114 (1958), *acq.* 1958-2, C.B. 3, the Tax Court had held that the late filing of a non-fraudulent return began the running of the general three year statute of limitations, the court in *Dowell* concluded that the filing of a non-fraudulent amended return after the filing of an original fraudulent return also started the running of the limitations period. We disagree.

Section 6501(c)(1) is clear on its face. It permits the Commissioner "[i]n the case of a false or fraudulent return with the intent to evade tax" to assess the tax or proceed in court without an assessment "*at any time.*" 26 U.S.C. §6501(c)(1) (emphasis added). There is nothing in the statute, its legislative history, or the regulations to indicate that the subsequent filing of an amended return has any effect on this provision.[5]

Original returns which are filed late, in contrast, are dealt with explicitly in section 6501(a):

> Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed

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5. We note that the treatment of amended returns is a matter of internal administration, and solely within the discretion of the Commissioner. Miskovsky v. U.S., 414 F.2d 954, 955 (3d Cir. 1969). Neither the Internal Revenue Code nor the Treasury Regulations make any provision for the acceptance of an amended return in place of the original return previously filed. Koch v. Alexander, 561 F.2d 1115, 1117 (4th Cir. 1977); Kearney v. A'Hearn, 210 F. Supp. 10, 16-17 (S.D.N.Y. 1962), *aff'd per curiam*, 309 F.2d 487 (2d Cir. 1962). *See also* Kaltreider Constr., Inc. v. United States, 303 F.2d 366, 368 (3d Cir. 1962), *cert. denied*, 371 U.S. 877 (1962) (three year period of limitation for filing refund claim is not altered by the filing of an amended return).

(whether or not such return was filed on or after the date prescribed).

(Emphasis added.) There is no comparable language relating to fraudulent original returns, and we have no reason to believe that Congress acted inadvertently when it treated the two situations differently.[6]

III.

Section 6501, as the district court noted in *Britton v. United States*, "balances the policy of repose to the taxpayer with the purpose of providing the Commissioner of Internal Revenue adequate time to assess taxes and deficiences." 532 F. Supp. at 278. We find no evidence that Congress struck that balance in such a way as to permit the Commissioner only three years to proceed against persons who filed fraudulent original returns and later submitted non-fraudulent amended returns.

According to the taxpayers, if a citizen has alerted the government to problems with an original tax return by filing an amended return, there is no need to permit the Commissioner unlimited time to assess taxes and deficiencies; furthermore, treating repentent and unrepentent tax evaders alike under section 6501(c)(1) removes all incentive for taxpayers to amend their fraudulent returns. They also assert that to allow the I.R.S. unlimited time to dangle the threat of prosecution, like the sword of Damocles, over the heads of persons who have filed

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6. The court in *Dowell* declared that section 6501(c)(1) and section 6501(c)(3) are *in pari materia* and should, therefore, be construed consistently with one another. We agree with that statement but reach a different conclusion, because we believe that Congress provided a clear indication in section 6501(a) that it did intend "statute of limitations treatment to differ between taxpayers who filed fraudulent returns, and those who fraudulently failed to file." Dowell v. Commissioner, 614 F.2d at 1266.

amended returns is to invite abuse.[7] The relevant question, however, is not whether it would be wise for Congress to create incentives for filing amended returns after fraudulent returns were filed or to restrict the ability of the Commissioner to assess taxes at any time, but rather whether Congress, in fact, did so. We are limited to interpreting the statute before us. It is not our role to set tax policy.

Not only is the language of this section of the statute relating to fraudulent returns clear, but nothing in the structure of the Internal Revenue Code leads us to believe that Congress intended parties who filed fraudulent returns to be permitted to take advantage of the general three year statute of limitations. The willful filing of fraudulent returns with intent to evade tax is consistently treated as the most serious form of tax evasion. A person who commits such fraud subjects himself to major civil and criminal penalties. He cannot escape those penalties or eradicate the fraud merely by filing a non-fraudulent amended return.

The Commissioner has six years to assess deficiencies against taxpayers who omit more than 25 percent of their gross income from their original returns.[8] Amend-

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7. The appellees have pointed to no cases in which the Commissioner has used his power under section 6501(c)(1) to prosecute fraud "at any time" in an abusive way. As the government notes in its brief, there are no real incentives for it to delay bringing civil assessment actions and very powerful incentives for it to act as quickly as possible. Delays serve only to make it more difficult for the I.R.S. to carry its burden of proof in fraud cases. The Commissioner, recognizing the problems inherent in delay, specifically requires agents to keep investigations involving possible fraud as "current" as any other type of case, even though the agents theoretically are faced with no limits on when such actions could be brought. II Audit, CCH Internal Revenue Manual, §4565.51(3).

8. 26 U.S.C. §6501(e)(1)(A) states:

> *Substantial omission of items.* Except as otherwise provided in subsection (c)—

ed returns have no effect on the six year period. *Houston v. Commissioner*, 38 T.C. 486 (1962); *Goldring v. Commissioner*, 20 T.C. 79 (1953). If, therefore, section 6501 were read as the taxpayers in these appeals urge us to do, we would create a situation in which persons who committed willful, deliberate fraud would be in a better position than those who, without an intent to commit fraud, had omitted more than 25 percent of their gross income from their original returns. There is no basis for concluding that in the single area of the statute of limitations Congress intended so to favor persons or corporations that have perpetrated tax fraud.

Moreover, the I.R.S. has advanced strong reasons for believing that a three year limitations period is not adequate to permit the Commissioner to meet his dual responsibility of proceeding both civilly and criminally. *Cf. United States v. LaSalle National Bank*, 437 U.S. 298, 308-309 (1978). It has long been the policy of the I.R.S. to defer civil assessment and collection until the completion of criminal proceedings. *See, e.g.*, Policy Statement P-4-84, 1 Administration, CCH Internal Revenue Manual, ¶1218; IV Audit, CCH Internal Revenue Manual, ¶¶4565.32(2) and 4565.42. This policy, which the Fifth Circuit characterized as both "necessary and wise," *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962), permits the I.R.S. to avoid the serious constitutional problems that could be created by simultaneous

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(1) Income taxes. In the case of any tax imposed by subtitle A —

(A) General rule. If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed.

proceedings, problems which can limit, for example, the availability of the ordinary tools for investigating civil tax liability once the commitment is made to refer a case for criminal prosecution. *U.S. v. LaSalle National Bank, supra.*

It is, furthermore, simply not the case that once an amended return is filed, the Commissioner can easily discover the fraud in the original return. The I.R.S. faces a heavy burden of proof in fraud cases, and thorough investigation of such frauds is a time-consuming process. *Klemp v. Commissioner*, 77 T.C. 201, 212-213 (1981) (Parker, J. dissenting). When passing the Act, Congress certainly knew of I.R.S. procedures and of the problems involved in ferreting out fraud. There is nothing to indicate that Congress intended to imply a term, absent in the statute itself, that would force the Commissioner to decide to proceed with only civil or criminal remedies or to jeopardize both by going forward civilly and criminally at the same time.

IV.

As Learned Hand reminded us, "[t]here is no surer guide in the interpretation of a statute than its purpose when that is sufficiently disclosed." *F.D.I.C. v. Tremaire*, 133 F.2d 827, 830 (2d Cir. 1943). But the courts in their search for the true purpose of Congress should not lightly go beyond the plain language of the statutes they are supposed to be interpreting and arrogate to themselves the power to divine in oracular fashion which among constitutionally permissible alternatives is the appropriate one.

The decision of the Tax Court in *Badaracco* and the judgment of the district court in *Deleet* will be reversed, and these cases will be remanded for further proceedings consistent with this opinion.

Appendix C

HUNTER, *Circuit Judge, dissenting:*

1. The majority holds that the filing of a non-fraudulent amended return after the filing of a fraudulent original return does not start the running of the three year statute of limitations in I.R.C. §6501(a) (1976) for the assessment of tax. I respectfully dissent.

2. The underlying facts involved in these appeals are not in dispute. In both cases, taxpayers originally filed fraudulent tax returns with the Commissioner. They later filed amended returns covering the same taxable periods. The Commissioner concedes that the amended returns were non-fraudulent and that they contained all the information the law required in the original filings. Over six years after the filing of the amended returns, the Commissioner issued deficiency notices for taxes allegedly owed by the taxpayers. Taxpayers sought relief,[1] arguing that the Commissioner's actions were barred by I.R.C. §6501(a) (1976), which requires the Commissioner to initiate the assessment and collection of tax within three years of the filing of a return. The Commissioner argued that his action was timely under section 6501(c)(1), which allows the Commissioner to initiate the assessment and collection of taxes at any time after the filing of a fraudulent return. I.R.C. §6501(c)(1) (1976). Applying the reasoning of *Dowell v. Commissioner*, 614 F.2d 1263 (10th Cir. 1980), and *Klemp v. Commissioner*, 77 T.C. 201 (1981), *appeal docketed*, No. 81-7744 (9th Cir. November 5, 1981), the courts below found for the taxpayers. These appeals followed.

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1. In *Badaracco* the taxpayer filed a petition with the tax court for a redetermination of the deficiency under I.R.C. §6213(a) (1976 & Supp. IV 1980). In *Delert* the taxpayer paid the tax and then sought a refund in the District Court for the District of New Jersey pursuant to I.R.C. §7422 (1976 & Supp. IV 1980) and 28 U.S.C. §1346(a)(1) (1976).

Appendix C

3. Section 6501 lays out the basic time limitations on the assessment and collection of taxes by the Commissioner. Section 6501(a) provides in relevant part:

> (a) **General rule.** — Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) . . . and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

I.R.C. §6501(a) (1976). Section 6501(c)(1) provides:

> (1) **False return.** — In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

I.R.C. §6501(c)(1) (1976). Interpreting these two provisions, the majority finds section 6501(c)(1) to be "clear on its face" and holds it to be a complete exception to section 6501(a), even when the taxpayer files a subsequent, non-fraudulent amended return.

4. While recognizing that "[t]he starting point in every case involving construction of a statute is the language itself," *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J. concurring), the Court has recently admonished that "ascertainment of the meaning apparent on the face of a single statute need not end the inquiry. . . . This is because the plain meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.' " *Watt v. Alaska*, 451 U.S. 259, 266 (1981), *quoting Boston Sand Co. v. United*

States, 278 U.S. 41, 48 (1928).[2] In this case sufficient persuasive evidence exists to lead me to a different conclusion than the majority about the proper interpretation of section 6501. Because amended returns are not an explicit part of the statutory scheme, because a reasonable alternative reading of the statutory scheme is apparent, and because the majority's holding leads to distorted results, I am unable to accept the majority's reading of the statute's "plain meaning."

5. First, although section 6501(c)(1) might be "clear on its face" concerning the Commissioner's statutory authority to act when a false or fraudulent return is *first* filed, it is not "clear" on the issue presented here, the effect of a *subsequent* filing of a non-fraudulent amended return. The majority itself acknowledges, majority op. at ____ n.4, that Congress has not provided for amended returns under the statute and that the Commissioner's treatment of them is a matter solely within his discretion. *Koch v. Alexander*, 561 F.2d 1115, 1117 (4th Cir. 1977); *Miskovsky v. United States*, 414 F.2d 954, 955-56 (3d Cir. 1969); *Lion Associates, Inc. v. United States*, 515 F. Supp. 550 (E.D. Pa. 1981).[3] They

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2. Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.) (L. Hand, J.), *aff'd*, 326 U.S. 404 (1945).

3. Taxpayers point to one provision which mentions "amendments" to returns. I.R.C. §6213(g)(1) (1976 & Supp. IV 1980) defines "return" for the purposes of §6213 as "any return, statement, schedule, or list, and any amendment or supplement thereto. . . ." The legislative history indicates that this definition was in-

are a creation of the Internal Revenue Service and not of Congress. It is thus difficult to understand how their effect on the statute of limitations can be discerned solely from the language of the statute when Congress made no provision for amended returns within the statutory scheme.

6. Second, *Dowell v. Commissioner*, 614 F.2d 1263 (10th Cir. 1980), offers a reasonable alternative interpretation of section 6501. *Accord Britton v. United States*, 532 F. Supp. 275 (D. Vt. 1981), *aff'd without opinion*, No. 82-6246 (2d Cir. April 15, 1982); *Klemp v. Commissioner*, 77 T.C. 201 (1981), appeal docketed, No. 81-7744 (9th Cir. November 5, 1981).[4] In *Dowell*, the court recognized that the fraudulent original return is not a "return" for the purposes of section 6501(a). The court cited *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172 (1934), in which the Supreme Court held that the statute of limitations began to run against deficiency assessments upon the filing of a first return if the first return is proper. The Court stated that "[p]erfect accuracy or completeness is not necessary to rescue a return from nullity, if it purports to be a return, is sworn to as such. . . . and evinces an honest and genuine endeavor to satisfy the law." 293 U.S. at 180. Applying this princi-

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NOTE — (*Continued*)

cluded to insure that the Commissioner reviewed all supporting schedules for "mathematical errors" before assessing deficiencies through summary proceedings. *See* H.R. Rep. No. 94-658, 94th Cong., 1st Sess. 289-93 (1975); S. Rep. No. 94-938, 94th Cong., 2d Sess. 375-78 (1976). It does not indicate that Congress explicitly included amended returns within the statutory scheme.

4. *See Espinoza v. Commissioner*, 78 T.C. 412 (1982); *Kramer v. Commissioner*, 44 T.C.M. (CCH) 42 (1982); *Elliott Liroff v. Commissioner*, 44 T.C.M. (CCH) 43 (1982); *Deyel v. Commissioner*, 44 T.C.M. (CCH) 45 (1982); *Richard B. Liroff v. Commissioner*, 44 T.C.M. (CCH) 47 (1982); *Nesmith v. Commissioner*, 42 T.C.M. (CCH) 1269 (1981), *appeal docketed*, No. 82-4162 (5th Cir. April 29, 1982) (all following *Klemp*).

ple to the instant situation, the *Dowell* court reasoned that a fraudulent return is not an honest and genuine effort to satisfy the law and thus does not start the running of any statutory limitation period. *Dowell*, 614 F.2d at 1265-66; *cf. Kaltreider Construction Co. v. United States*, 303 F.2d 366, 368 (3d Cir.), *cert. denied*, 371 U.S. 877 (1962) (the first return must be complete and meet the statutory requirements; the statute of limitations will begin to run only upon the filing of a proper return) (dicta). Section 6501(c)(1) does apply whenever an inadequate return is filed, not as a statute of limitations, but rather as a provision allowing the government to institute a suit at any time.[5] When a valid return is filed, even in the form of an amended return to a previously filed fraudulent return, the limitation period of section 6501(a) begins to run.

7. Third, the *Dowell* court's statutory reading of section 6501 "balances the policy of repose to the taxpayer with the purpose of providing the Commissioner of Internal Revenue adequate time to assess taxes and deficiencies." *Britton*, 532 F. Supp. at 278. While a fraudulent return may put the Commissioner at a special disadvantage in detecting errors, the filing of an amended return removes the disadvantage by providing the Commissioner with all the information required by law. The general rule, therefore, should govern. *Dowell*, 614 F.2d at 1265.[6] That interpretation also avoids the distorted re-

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5. As the Tenth Circuit recognized in *Dowell*, §6501(c) "represents the antithesis of a limitation period." 614 F.2d at 1265-66.

6. That reading is also consistent with the language of §6501(a) that tax must be assessed within three years after a return is filed "whether or not such return was filed on or after the date prescribed." I.R.C. §6501(a). When no return is filed, the Commissioner is able to act "at any time" under I.R.C. §6501(c)(3). If a return is later filed, however, the Commissioner then has all the necessary information to assess what tax is due, and the general three year period applies. *Dowell*, 614 F.2d at 1265; *Bennett v. Commissioner*, 30 T.C. 114, 124 (1958).

sult reached by the majority. Under the majority's holding, once a fraudulent return is filed, the threat of future assessment of deficiencies will hang in perpetuity like the Sword of Damocles over the head of the taxpayer, despite his efforts to set the record straight.[7]

8. In reaching my conclusion, I do not purport to set tax policy, rather merely to interpret the tax code in light of congressional purpose. *See Rose v. Lundy*, ____ U.S. ____, ____ (1982) (when Congress never thought of the problem, courts must examine a statute's underlying purposes to determine its proper scope); *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979) ("As in all cases of statutory construction, our task is to interpret the words of these statutes in light of the purposes Congress sought to serve."). My interpretation of section 6501 reflects the factual reality that the Commissioner has made amended returns an integral part of the administrative scheme,[8] even though Congress did not make it an explicit part of the statutory scheme. The differing conclusions reached by the majority and the tenth circuit indicate that Congress' intent under this provision is far from clear and that perhaps section 6501 is a proper area for further legislative scrutiny. I am unable nonetheless to join the majority's hold-

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7. The application of the three year statute of limitations will not allow a taxpayer who previously filed a fraudulent return to "escape [the] penalties or erase the fraud merely by filing a non-fraudulent amended return." Majority op. at ____. The taxpayer is still subject to civil and criminal sanctions as long as the Commissioner acts within three years.

8. The Commissioner's regulations provide for the use of amended returns by the Internal Revenue Service. *See, e.g.*, 26 C.F.R. §§301.6211-1(a), 6402-3(a)(5) (1982). When the I.R.S. has accepted amended returns, as in this case, the courts have given them effect. *E.g., United States v. Samara*, 643 F.2d 701, 704 (10th Cir.), *cert. denied*, 454 U.S. 829 (1981); *Bookwalter v. Mayer*, 345 F.2d 476, 480 (8th Cir. 1965).

ing that section 6501, as presently written, does not provide for the application of a three year statute of limitations in this case.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX D — OPINION OF THE UNITED STATES TAX COURT IN *BADARACCO, ET AL. v. COMMISSIONER OF INTERNAL REVENUE*

T.C. Memo. 1981-404

UNITED STATES TAX COURT

ERNEST BADARACCO, SR. and ROSE BADARACCO, Petitioners v. COMMISSIONER OF INTERNAL REVENUE, Respondent

ERNEST BADARACCO, JR. and BARBARA BADARACCO, Petitioners v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket Nos. 1700-78, 1701-78 Filed August 5, 1981.

John J. O'Toole, for the petitioners.

Robert B. Marino, for the respondent.

MEMORANDUM OPINION

PARKER, *Judge:* Respondent determined the following deficiencies in Federal income taxes and additions to the tax in these consolidated cases:

Ernest Badaracco, Sr. and Rose Badaracco — Docket No. 1700-78

Year	Deficiencies in Income Tax[1]	Additions to the Tax Sec. 6653(b)[2]
1964	$21,072.39	$10,536.20
1965	- 0 -	9,226.74

1. Since the petitioners in each docket paid the deficiencies for the years 1965 through 1969 when they filed their amended returns for those years, the statutory notices issued by respondent more than six years after the filing of the amended returns showed no deficiencies for those years.

2. Unless otherwise indicated, all section references are to the Internal Revenue Code of 1954, as amended and in effect during the taxable years here involved.

Appendix D

1966	- 0 -	9,998.11
1967	- 0 -	19,912.45
1968	- 0 -	24,916.43
1969	- 0 -	27,175.44

Ernest Badaracco, Jr. and Barbara Badaracco — Docket No. 1701-78

Year	Deficiencies in Income Tax	Additions to the Tax Sec. 6653(b)
1964	$20,331.07	$10,165.54
1965	- 0 -	8,775.99
1966	- 0 -	9,071.82
1967	- 0 -	18,969.97
1968	- 0 -	23,304.95
1969	- 0 -	24,503.43

The petitioners in each docket have conceded the deficiency in income tax for the taxable year 1964, and each petitioner-husband has conceded the addition to the tax pursuant to section 6653(b) for the taxable year 1964. For the taxable years 1965 through 1969, petitioners later filed nonfraudulent amended returns and paid the tax due thereon. Only the additions to the tax pursuant to section 6653(b) remain in dispute for those years. The only issue for decision is whether the filing of nonfraudulent amended returns, subsequent to having filed fraudulent returns, entitled petitioners to the three-year statute of limitations in section 6501(a) so as to bar the assessment and collection of the additions to tax for fraud for the years 1965 through 1969.

Most of the facts have been stipulated and are so found. The stipulation of facts is incorporated herein by this reference.

Appendix D

Other findings are based upon admissions in the pleadings and petitioners' responses to respondent's request for admissions.

Petitioners Ernest Badaracco, Sr. and Rose Badaracco (hereinafter Ernest, Sr.), petitioners in Docket No. 1700-78, resided in Hoboken, New Jersey, at the time they filed their petition in this case. Petitioners Ernest Badaracco, Jr. and Barbara Badaracco (hereinafter Ernest, Jr.), petitioners in Docket No. 1701-78, resided in Fort Lee, New Jersey, at the time they filed their petition in this case. Ernest, Sr. and Ernest, Jr. are father and son. During the years in issue, they were equal partners in Badaracco Brothers and Company, an electrical contractor. All of the petitioners filed original joint Federal income tax returns for the taxable years 1965 through 1969 on the following dates:

Year	Date Filed
1965	April 15, 1966
1966	April 15, 1967
1967	April 15, 1968
1968	May 28, 1969
1969	April 15, 1970

Badaracco Brothers and Company filed original forms 1065 for the taxable years 1965 through 1969 on the cash method of accounting on the same dates as the petitioners filed their individual returns. All of the original returns were timely filed except the returns for 1968.

For purposes of these cases, petitioners have conceded the fraudulent nature of these original income tax returns and partnership information returns.

Appendix D

On November 17, 1971, Ernest, Sr. and Ernest, Jr. were indicted on 15 counts under section 7206(1)[3] for filing false and fraudulent individual income and partnership tax returns for the years 1965 through 1969. They entered a plea of guilty to the charge of filing a false and fraudulent partnership tax return for the year 1967. The remaining counts of the indictment were dismissed. Petitioners Ernest, Sr. and Ernest, Jr. have conceded here that there was an underpayment of the tax required to be shown on their original returns for each of the years 1965 through 1969 and that those underpayments were due to fraud within the meaning of section 6653(b).

On August 17, 1971, petitioners filed nonfraudulent amended income tax returns and partnership information returns for each of the taxable years 1965 through 1969. The taxes reported on the amended returns were paid at the time the returns were filed and were timely assessed. Respondent issued his statutory notices of deficiency in each of these cases on November 21, 1977, more

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3. SEC. 7206. FRAUD AND FALSE STATEMENTS.

Any person who—

(1) *Declaration Under Penalties of Perjury.*— Willfully makes and subscribes any return, statement, or other documents, which contains or is verfied by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

* * *

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

than six years after the filing of the nonfraudulent amended returns.

The only issue for decision is whether the assessment and collection of the fraud penalties under section 6653(b) for the years 1965 through 1969 is barred by the three-year statute of limitations in section 6501(a).[4] Section 6501 provides in pertinent part as follows:

> SEC. 6501. LIMITATIONS ON ASSESSMENT AND COLLECTION.
>
> (a) *General Rule.*—Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed). . . .
>
> • • •
>
> (c) *Exceptions.*—
>
> (1) *False Return.*—In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court

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4. Petitioners have conceded that the additions to the tax under section 6653(b) are in the amounts as set out in the statutory notices of deficiency in these cases. Therefore, there is no dispute as to the amounts of the fraud penalties, if assessment and collection is not barred. The additions to the tax for each of the taxable years 1965 through 1969 were calculated upon the underpayments shown on the amended returns, *i.e.* the difference between the tax shown on the original return and the amended return for each year.

for collection of such tax may be begun without assessment, at any time.[5]

Petitioners argue that their filing of nonfraudulent amended returns subsequent to their filing of fraudulent original returns renders the unlimited period for assessment in section 6501(c)(1) inapplicable and triggers the three-year period of limitations in section 6501(a). Respondent argues that the applicable period of limitations was determined by the nature of the fraudulent original returns and was the unlimited period provided by section 6501(c)(1). In support, respondent contends that no language in section 6501 and no subsequent action by petitioners rendered section 6501(c)(1) inapplicable or served to bring section 6501(a) into operation.

We recently decided this same question in the taxpayer's favor in a court reviewed decision that involved a factual situation almost identical to the one herein. *Klemp v. Commissioner*, 77 T.C. No. 17 (August 5, 1981). Our decision in *Klemp* is dispositive of the issue in the present case.[6] Accordingly, we hold that the fraud

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5. Section 250(d) of the Revenue Act of 1921, ch. 136, 42 Stat. 265 for the first time provided for a period of limitations for assessment and collection of taxes. Section 250(d) required the Commissioner of Internal Revenue to determine and assess taxes within four years after a return was filed. With respect to a false or fraudulent return or a failure to file a required return, section 250(d) retained the prior unlimited period for determining and assessing taxes. Now of course the three-year period in section 6501(a) is the general rule and the unlimited period in the case of a false or fraudulent return in section 6501(c)(1) is referred to as an exception to the general rule.

6. While I still adhere to the views expressed in my dissenting opinion in *Klemp*, I of course accept the majority opinion as the law in this Court. In *Klemp*, the Court followed the decision of the 10th Circuit Court of Appeals in *Dowell v. Commissioner*, 614 F. 2d 1263 (10th Cir. 1980), revg. and remg. 68 T.C. 646 (1977). Any appeal in the present case would lie to the Third Circuit.

penalties determined by respondent for the years 1965 through 1969 are barred by the three-year statute of limitations in section 6501(a). To reflect the concessions and the holding of the Court

Decisions will be entered in each docket for the respondent for the taxable year 1964 and for the petitioners for the taxable years 1965 through 1969.

APPENDIX E — OPINION IN *RAYMOND D. KLEMP, et al v. COMMISSIONER OF INTERNAL REVENUE*

77 T. C. No. 17

UNITED STATES TAX COURT

RAYMOND D. KLEMP and ANN L. KLEMP, Petitioners *v.* COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 14491-79.

Filed August 5, 1981

Petitioners filed fraudulent original income tax returns for 1970, 1971, 1972 and 1973. On October 17, 1974, petitioners filed nonfraudulent amended returns for those years. More than three years after the filing of the amended returns, but within six years of the filing of the original fraudulent 1973 return, respondent issued his notice of deficiency. *Held,* respondent's proposed assessment is barred by the statute of limitations provided in section 6501(a) which began running on the filing of the amended returns. *Dowell v. Commissioner,* 614 F. 2d 1263 (10th Cir. 1980), revg. 68 T.C. 646 (1977), followed. *Held, further,* the six year statute of limitations provided in section 6501(e) did not apply to 1973.

Kevin O'Connell, for the petitioners.

Gary R. DeFrang, for the respondent.

Appendix E

OPINION

HALL, *Judge*: This case is before the Court on petitioners' motion for summary judgment. Rule 121, Tax Court Rules of Practice and Procedure.

Respondent determined deficiencies in petitioners' taxes, plus additions to tax for fraud under section 6653(b)[1] as follows:

Year	Deficiency	Addition to Tax Under Sec. 6653(b)[2]
1970	$ 1,347	$ 1,868
1971	1,452	4,111
1972	2,079	7,658
1973	4,860	10,946

The issue for decision is whether the statute of limitations bars the assessment and collection of deficiencies in income taxes and additions to the taxes for the years 1970 through 1973.

For purposes of this motion only, the facts have been fully stipulated and are found accordingly.

Raymond D. and Ann L. Klemp, husband and wife, resided in Eugene, Oregon, at the time they filed their petition. Petitioners timely filed joint income tax returns for the years 1970, 1971 and

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1. All section references are to the Internal Revenue Code of 1954, as in effect during the years in issue.

2. The fraud penalties are larger than the deficiencies because the deficiencies are based on the amended returns while the fraud penalties are based on the original returns. See section 6653(c)(1).

1973. Petitioners filed their 1972 joint income tax return on June 21, 1973. (These returns will be referred to as petitioners' "original" returns.)

There was an underpayment of the tax required to be shown on petitioners' original returns for each of the years 1970 through 1973. All or a part of each such underpayment was due to fraud. Petitioners omitted from their original 1973 return gross income in excess of 25 percent of the gross income reported and failed to disclose receipt of such omitted gross income on the return or in a statement attached thereto.

In a letter dated July 26, 1974, respondent notified petitioners that their original 1973 return was to be audited. On October 17, 1974, petitioners met for the first time with a representative of respondent. At that meeting they presented respondent's representative with amended income tax returns (the "amended" returns) for the years 1970 through 1973.

None of petitioners' amended returns omits gross income exceeding 25 percent of the reported amounts. In addition, the tax underpayments, if any, not reported on the amended returns are not due to fraud.

Respondent issued his notice of deficiency in this case on July 9, 1979.

In their motion for summary judgment petitioners claim that respondent's proposed assessments are barred by the statute of limitations found in section 6501(a).[3] Respondent, on the other

3. Section 6501(a) provides:

> (a) General Rule.--Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) ***

(Cont'd)

hand, asserts that since petitioners' original returns were fraudulent, section 6501(c)(1)[4] controls and he may assess a tax at any time.

Alternatively, respondent contends that since petitioners' original fraudulent 1973 return omitted from gross income an amount in excess of 25 percent of the amount reported, his proposed assessment for 1973 is not barred because the applicable period of limitations is 6 years as provided in section 6501(e).[5]

This case presents the same question we addressed in *Dowell v. Commissioner*, 68 T.C. 646 (1977), revd. 614 F. 2d 1263 (10th

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(Cont'd)

and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

4. Section 6501(c)(1) provides:

(c) EXCEPTIONS.--

(1) FALSE RETURN.--In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

5. The relevant portion of section 6501(e) is section 6501(e)(1)(A), which provides:

(A) GENERAL RULE.--If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed. • • •

Cir. 1980). In *Dowell* the taxpayers initially filed fraudulent income tax returns for the years 1963 through 1966. Subsequently, the taxpayers filed nonfraudulent amended returns. More than three years after the filing of the amended returns, respondent and the taxpayers entered into agreements to extend the period of limitation for assessing a tax. Respondent ultimately issued his notice of deficiency within the time provided for by the extensions. Since the extensions are valid only if executed within the period of limitations (section 6501(c)(4)), the question in *Dowell* was whether the amended returns barred respondent from the assessment and collection of taxes.

We held that petitioners' filing of the original fraudulent returns controlled the period of limitations, that the amended returns had no effect on the period of limitations, and, accordingly, under section 6501(c)(1) respondent was entitled to assess the tax at any time. The Tenth Circuit reversed.

In the present case, petitioners ask that we abandon our position in *Dowell* and adopt the position of the Tenth Circuit. Based on a thorough reevaluation of this issue, we conclude that the Tenth Circuit's result in *Dowell* is correct.

Section 6501(a) provides that, except as otherwise provided, the period of limitations for the assessment of a tax runs for three years after the return is filed. The two major categories of exceptions to this general rule are found in sections 6501(c) and 6501(e). Section 6501(c)(1) provides that in the case of the filing of a false or fraudulent return with the intent to evade tax, the tax may be assessed at any time. Section 6501(e) provides that, except as otherwise provided in section 6501(c), in the case of a taxpayer who omits from gross income an amount in excess of 25 percent of the gross income reported on the return, the tax may be assessed at any time within six years after the return was filed.

Appendix E

The Tenth Circuit in *Dowell* pointed out that unlike sections 6501(a) and 6501(e), section 6501(c)(1) is not a statute of limitations but rather the antithesis thereof.[6] Section 6501(c)(1) provides that under certain circumstances there is no period of limitations. The entire thrust of the Tenth Circuit's opinion, with which we agree, is that the filing of the amended returns did not change a period of limitations but rather started one. Prior to the filing of petitioners' amended returns in this case, no period of limitations was running. Upon the filing of the correct amended returns, the three-year statute of limitations started running.[7]

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6. That section 6501(c)(1) is not a statute of limitations can be discerned from an examination of what constitutes a statute of limitations. A statute of limitations *limits* the time within which an action can be taken. See 53 C.J.S. Limitations of Actions §1; 51 Am. Jur. 2d Limitations of Actions §2. Section 6501(c)(1), as pointed out by the Tenth Circuit, does not provide any time limit on the assessment or collection without assessment of taxes.

In addition, legislative history indicates that Congress does not view section 6501(c)(1) as a statute of limitations. In discussing section 276(a) of the 1934 Code (a predecessor to section 6501(c)(1)) the House Report commented:

> The present law permits the government to assess the tax without regard to the statute of limitations in case of failure to file a return or in case of a fraudulent return.

H.R. Rept. No. 704, 73d Cong., 2d Sess. 35 (1934). See also S. Rept. No. 558, 73d Cong., 2d Sess. 44 (1934).

7. The Fifth Circuit in *Woolf v. United States*, 578 F. 2d 1103 (5th Cir. 1978), adopted a somewhat different approach in dealing with section 6501(c)(2). In *Woolf* the taxpayer willfully attempted to defeat or evade FICA taxes. Under such circumstances section 6501(c)(2) provides that such taxes may be assessed or collected without assessment at any time. Eventually the taxpayer filed untimely but substantially accurate returns. The taxpayer argued that the filing of such returns started the running of the section 6501(a) period of limitations. The Fifth Circuit disagreed and emphasized that the key inquiry under section 6501(c)(2)

(Cont'd)

Appendix E

Although it can be argued that "the return" in section 6501(a) indicates that for the purpose of the various statutes of limitations contained in section 6501 there is only one return per year, presumably the first return filed,[8] such a narrow reading of the statute is not appropriate when there is a good policy reason for a broader interpretation. While there is a general three-year statute of limitations in section 6501(a), as we have noted above other subparagraphs of section 6501 provide longer or unlimited periods for assessments and collection of the tax. For example, subparagraph (c) provides for no limitation in the case of false returns or no returns, and subparagraph (e) provides for a six-year statute in the case of substantial omissions of income. These various limitations are intended to give respondent adequate time to assess the tax. In *The Colony, Inc. v. Commissioner*, 357 U.S. 28 (1958), the Supreme Court noted that the Congressional purpose underlying the enactment of the predecessor to section 6501(e) was

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(Cont'd)
is whether the taxpayer established that his willful attempt to evade taxes ended with the filing of his untimely returns. Based on the taxpayer's failure to establish that fact, the court held that there was no applicable period of limitations. The court specifically stated that, assuming the initial applicability of section 6501(c)(2), it was not deciding whether the period of limitations provided under section 6501(a) would start running upon the later filing of correct amended returns.

8. See, *e.g.*, *Sargent v. Commissioner*, 22 B.T.A. 1270 (1931) (taxpayers' original return started the running of the period of limitations and such period cannot be affected by the filing of amended returns); *Weaver v. Commissioner*, 4 B.T.A. 15 (1926) (statute of limitations begins running on the filing of original--not amended--returns); *National Refining Co. of Ohio v. Commissioner*, 1 B.T.A. 236 (1924) (the phrase "the return" has a definite article and singular subject and therefore can only mean the return contemplated by the relevant statute).

> * * * to give the Commissioner an additional two years to investigate tax returns in cases where, because of a taxpayer's omission to report some taxable item, the Commissioner is at a special disadvantage in detecting errors. In such instances the return on its face provides no clue to the existence of the omitted item.

Id. at 36. Similarly, the purpose of section 6501(c)(1) is to provide the Commissioner with an unlimited amount of time when he is at a special disadvantage based on the taxpayer's fraud. This is the position we took in *Bennett v. Commissioner,* 30 T.C. 114 (1958), where we held that the filing of a return subsequent to the fraudulent failure to file a return was sufficient to start the running of the period of limitations. in *Bennett v. Commissioner, supra* at 123-124, we stated:

> For, once a nonfraudulent return is filed, putting the Commissioner on notice of a taxpayer's receipts and deductions, there can be no policy in favor of permitting assessment thereafter at any time without limitation. We think that the statute of limitations begins to run with the filing of such returns. Cf. *J. P. Bell Co.,* 3 B.T.A. 254, 255; *Paul Haberland,* 25 B.T.A. 1370, 1376-1377; *Helvering v. Campbell,* 139 F. 2d 865, 868 (C. A. 4) Accordingly, unless the delinquent returns were themselves fraudulent, the period of limitations began to run on April 21, 1950, when they were filed, * * *.

Based on this reasoning, we can see no reason for not allowing the section 6501(a) period of limitations to control in the present case.[9]

The second issue raised by respondent is his assertion that since petitioners omitted from gross income an amount in excess of 25 percent of the amount reported on their original fraudulent 1973 return, the applicable period of limitations is six years as provided in section 6501(e) instead of the unlimited period contained in section 6501(c). Section 6501(e) explicitly does not apply to situations covered by section 6501(c). Respondent stipulated that petitioners' original 1973 return was fraudulent. Accordingly, no period of limitations began running upon the filing of petitioners' original return. The only period of limitations that ever became applicable in this case is the period provided in section 6501(a), which period expired before respondent mailed his notice of deficiency.[10]

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9. Were respondent not precluded from assessing and collecting the deficiency by the running of the statute of limitations, he would not be prevented from collecting the fraud penalty because petitioners filed amended nonfraudulent returns. It is well established that the filing of an amended return does not affect the amount of an addition to tax which results from a taxpayer's original return. *Bennett v. Commissioner*, 30 T.C. 114, 123 (1958); *George M. Still, Inc. v. Commissioner*, 19 T.C. 1072, 1076-1077 (1953), affd. 218 F. 2d 639 (2nd Cir. 1955).

10. In *Dowell, supra*, at 649, we observed that "[i]t is well settled that when a taxpayer files an original return and thereafter an amended return, the statute of limitations begins to run from the date of the original return, and not the date of the filing of the amended return." Absent a fraudulent return, the filing of a subsequent amended return after an original nonfraudulent return has been filed will, of course, not extend the period of limitations under sections 6501(a) or 6501(e). The respective periods under these sections will continue to commence with the filing of the original return, and not the amended return. See *Houston v. Commissioner*, 38 T.C. 486 (1962).

Appendix E

Based on the foregoing, petitioners' motion for summary judgment will be granted.

An appropriate order and

decision will be entered.

Reviewed by the Court.

WILBUR, *J.*, concurring in part and dissenting in part: I concur in the interpretation of section 6501(c) by the majority. Respondent would leave the statute open for that portion of eternity concurrent with the taxpayer's life, whether he lives three score and ten or as long as Methuselah. In most religions one can repent and be saved but in the peculiar tax theology of respondent no act of contrition will suffice to prevent the statute from running in perpetuity. Merely to state the proposition is to refute it, unless some very compelling reasons of policy require visiting this absurdity on the taxpayer. The majority makes it clear that the reasoning of *Bennett v. Commissioner*, 30 T.C. 114 (1958), applies to the question presented in this case.

However, I cannot subscribe to the result the majority reaches under section 6501(e). I believe that based on our decision in *Goldring v. Commissioner*, 20 T.C. 79 (1953), respondent should have 6 years from the date the original 1973 return was due in which to assess and therefore the notice of deficiency was timely when mailed on July 9, 1979. On March 15, 1946, the petitioners in *Goldring* filed their 1945 income tax returns omitting more than 25 percent of the gross income stated therein. On June 16, 1947, petitioners filed amended returns for the 1945 taxable year which purported to correct, in part, the original omission so as to reduce it below 25 percent. Respondent issued a notice of deficiency for 1945 on March 15, 1951, more than 3 years after

the amended return was filed but less than 5 years after filing of the original return. We held that the deficiency notice was timely under section 275(c) (the predecessor of section 6501(e)) since it was issued within 5 years after the original return was filed, although more than 3 years after the amended return. We stated that the 5-year limitation period under section 275(c) started to run upon the filing of the original return and that the filing of the amended return had no effect for statute of limitations purposes.[1]

Similarly, in *Houston v. Commissioner,* 38 T.C. 486 (1962), the taxpayer's wife filed a joint 1953 return on February 10, 1954, having been properly authorized to do so by her husband who was serving in a combat zone. The return reported only the wife's income of $3,968.53. Subsequently, the taxpayer filed a joint return (on June 27, 1955), reporting only his own salary of $7,670.82. A consent to extend the statute of limitations to June 30, 1960, was signed on February 4, 1959. The Commissioner sent a notice of deficiency for 1953 on November 24, 1959. We rejected petitioner's arguments that the statute of limitations had run prior to his signing the consent to an extension. Having found that more than 25 percent of gross income had been omitted from

---

1. Similarly, it is well-settled that the filing of an amended return does not alter the period of limitations under sec. 6501(a) (and predecessor section) which started to run upon the filing of the original return. See, e.g., *Vitamin Co. v. Commissioner,* 21 B.T.A. 311 (1930); *Lancaster Lens Co. v. Commissioner,* 10 B.T.A. 1153 (1928). Both sections 6501(a) and (e) contain definite periods of limitations and thus the filing of an amended return (which has no statutory basis, see *Goldring v. Commissioner,* 20 T.C. 79 (1953)), could not alter the period of limitations that started upon the filing of the original return. However, since sec. 6501(c) is not a statute of limitations, no period ever began running at the filing of the original return, and thus the filing of a nonfraudulent amended return changes the character of the original fraudulent return thereby triggering the normal 3-year period of limitations under sec. 6501(a).

the original 1953 joint return filed by the taxpayer's wife, it was held that the statute of limitations ran for 5 years from the due date for the original return (the original return having been filed early):

> Petitioner's second 1953 return is at best an amended return. It is settled law that an amended return does not operate to prevent section 275(c) of the 1939 Code from applying to the original return. *Ira Goldring*, 20 T.C. 79 (1953). As for the case of *Charles F. Bennett*, 30 T.C. 114 (1958), urged upon us by the petitioner, it is sufficient to point out that there we applied the 3-year statute of limitations to an original, albeit delinquent, return. [*Houston, supra* at 489.]

It is thus clear that in the section 6501(e) situation, the original return starts the limitation period and that for such purpose the subsequent amended return is ignored. Both *Goldring* and *Houston* cannot be read any other way, and *Houston* makes it clear that *Bennett*—on which the majority specifically relies—does not alter this result. Even considered on a clean slate, the majority decision on section 6501(e) is wrong; how it can possibly be reached with *Goldring* and *Houston* on the books is beyond me.

The present case involves facts virtually identical to *Goldring* and the parties agree that the taxpayers' original return contained a substantial omission within the meaning of section 6501(e). *Goldring* and *Houston* make it clear that the 6-year statute of limitations applies and a deficiency notice is timely even though it is sent out more than 3 years after the amended return is filed. These cases plainly state that the subsequent filing of an amended return will not affect the limitations period under section 6501(e). Yet the majority now holds under precisely the same circumstances

(except that the dereliction is also accompanied by fraud) that the Commissioner is barred from assessing although the 6-year statute of limitations has not yet run. Not only is this impossible to reconcile with *Goldring* and *Houston*, and the purpose and policy of section 6501, it is anomalous in the extreme to rule that when fraudulent intent accompanies a 25 percent omission the taxpayer's period of exposure under the statute is shortened.

The majority makes short work of the section 6501(e) issue, merely stating that "section 6501(e) explicitly does not apply to situations covered by section 6501(c)." But the statutory language says that the 6-year period provided in section 6501(e) applies "[e]xcept as *otherwise* provided in subsection (c)." (Emphasis added). This simply makes clear the obvious—that where the 6-year period of (e) and the unlimited period of (c) are both applicable, the taxpayer may not confine the respondent to the shorter period. To effectuate this objective, Congress has simply stated that the 6-year period is inapplicable when a period in perpetuity already applies.[2]

Additionally, the majority has compounded its misreading of section 6501(e) with a catch 22 twist that should not be overlooked. It holds that section 6501(e) "does not apply to situations covered by section 6501(c)"—that is where the statute runs in perpetuity. But it has at this point already held the statute doesn't run in perpetuity, that the terms of section 6501(c) are inapplicable. The majority holds not only that the statute applicable to petitioners' 1973 return fails to run in perpetuity,

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2. This is borne out by the respondent's regulations under section 6501(e) which provide: "(c) *Exception.* The provisions of this section do not *limit* the application of section 6501(c)." Sec. 301.6501(e)-1(c), Proced. & Admin. Regs. [Emphasis added.]

but also that it expired on October 17, 1977—about 3 and one-half years after the original return was filed. Put another way, we are told in one breath that the 6-year statute is inapplicable because under section 6501(c) the statute runs in perpetuity, and in the next breath that the statute doesn't run in perpetuity, but for less than 4 years.

Logic and precedent are not the only casualties of this approach, for common sense must be added to the list of the wounded. While Congress has provided the longest period for assessment where fraud is involved--the majority has reversed the procedure. According to the majority, absent fraud, the respondent would have had 6 years to assess under section 6501(e); since it was stipulated fraud was present, he only had 3 and 1/2 years as to 1973. Why fraud should be rewarded over inadvertence or negligence escapes me.

The majority notes that in *The Colony, Inc. v. Commissioner,* 357 U.S. 28, 36 (1958), the Supreme Court explained the purpose of section 6501 as being

[To] give the Commissioner an additional two years to investigate tax returns in cases where, because of a taxpayer's omission to report some taxable item, the Commissioner is at a special disadvantage in detecting errors. In such instances the return on its face provides no clue to the existence of the omitted item.

In *Houston v. Commissioner,* 38 T.C. 486, 490, we added:

As a general proposition, the Commissioner is always at a "special disadvantage" where an item of income is omitted from a return, for whatever reason that item is omitted. We find no rule enunciated here requiring specific prejudice to the Commissioner before section 275(c) becomes applicable.

Appendix E

By providing a period of limitations substantially shorter than the 6-year period afforded by section 6501(e), even though there has admittedly been a 25-percent omission as required by that subsection, the majority simply misinterprets the statute ignoring prior precedent along the way. For these reasons, I respectfully dissent.

PARKER, *J.*, dissenting: I respectfully dissent. The majority holds that, subsequent to the filing of a fraudulent original return, the three-year statute of limitations in section 6501(a) begins to run upon the filing of a nonfraudulent amended return. I believe this interpretation of section 6501 fails to give effect to the plain language of the statute.

Section 6501(a) provides that "Except as otherwise provided in this section, the amount of any tax . . . shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed . . ." As stated by the majority, exceptions to the general rule of section 6501(a) may be found in sections 6501(c) and 6501(e). Section 6501(c)(1) provides that, in the case of the filing of a false or fraudulent return with the intent to evade tax, the tax may be assessed "at any time." Section 6501(e) provides that, except as otherwise provided in section 6501(c), in the case of a taxpayer who omits from gross income an amount in excess of 25 percent of the gross income reported on the return, the tax may be assessed at any time within six years after the return was filed.

In the present case, section 6501(c)(1) applies to the filing of the original fraudulent returns and specifically provides an unlimited period of assessment of the taxes. The majority apparently agrees that the fraudulent returns herein were "returns"

for purposes of triggering the exception in section 6501(c)(1).[1] The majority reasons that, since the fraudulent returns did not start the running of any period of limitations, the nonfraudulent amended returns became the "returns" referred to in section 6501(a) for purposes of starting the three-year statute of limitations.

However, there is no indication in the wording of section 6501 that any action subsequent to the filing of fraudulent original returns, including the filing of nonfraudulent amended returns, renders section 6501(c)(1) inapplicable and triggers section 6501(a). There is no language in the statute requiring that a statute of limitations ever begin running where section 6501(c)(1) applies in the first instance. No subsequent event can alter the fact that petitioners herein filed fraudulent original returns. Just as we have held that the filing of a nonfraudulent amended return does not bar the imposition of the fraud penalty itself, *Bennett v. Commissioner,* 30 T.C. 114, 125 (1958), likewise it should not cut short the time within which that penalty may be assessed.

The main thrust of the majority's opinion is that the policy underlying the unlimited period of limitations in section 6501(c)(1) is to provide respondent with sufficient time to investigate a taxpayer's returns where respondent is at a special disadvantage based on the taxpayer's fraud. The majority believes that that policy no longer applies once, as in the present case, the taxpayer

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1. If the fraudulent returns were not "returns," then section 6501(c)(1) would not apply in the first place. The Ninth Circuit, to which an appeal would lie in this case, has specifically held that a fraudulent return was nevertheless a "return" where it purported to be a return and there was no apparent refusal to comply with the requirements for filing returns. *United States v. Crowhurst,* 46 AFTR 2d 80-5673, 80-2 U.S.T.C. ¶9638 (9th Cir. 1980).

has filed nonfraudulent amended returns putting respondent on notice as to his income and deductions. Thus, according to the majority, once respondent receives a nonfraudulent amended return, he no longer needs an unlimited period within which to assert the fraud penalty.

In support of its position, the majority cites the Supreme Court's language in *The Colony, Inc. v. Commissioner,* 357 U.S. 28 (1958), stating that the purpose of the extended five-year period in the predecessor to section 6501(e) was to give respondent two extra years to investigate returns where he was at a disadvantage due to the taxpayer's omission of items totalling 25 percent of his gross income. However, in the section 6501(e) situation, the subsequent filing of amended returns without substantial omissions does not affect the running of the five [or six] year period which commenced with the filing of original returns with substantial omissions. *Houston v. Commissioner,* 38 T.C. 486 (1962); *Goldring v.Commissioner,* 20 T.C. 79 (1953). In other words, a taxpayer files an amended return correcting the substantial omission in his original return, even though respondent then has all of the facts pertaining to that omission before him and he no longer needs additional time to assess the proper tax, the filing of the amended return does not cut short the original period of limitations.

In the section 6501(c)(1) situation, when a taxpayer files a nonfraudulent amended return in an attempt to correct a fraudulent original return, respondent will have all of the facts relating to the underpayment but will not necessarily have all of the facts he needs to prove by clear and convincing evidence a fraudulent intent to evade tax. Absent proof of that specific intent, evidence of an underpayment standing alone will not support the imposition of the fraud penalty. Thus, while three years may be an adequate period within which to assert the fraud penalty where

the taxpayer's fraudulent intent is established in prior criminal proceedings or by stipulation, the three years may not be enough time for respondent to prove fraudulent intent where a more extensive investigation is required. The majority's interpretation of section 6501 does not take into account respondent's heavy burden of proof in fraud cases.

The situation in *Bennett v. Commissioner, supra,* relied on by the majority, is distinguishable from the present case. The taxpayer in *Bennett* failed to file returns within the meaning of the predecessor to section 6501(c)(3), and his failure to file was fraudulent.[2] We held that the subsequent filing of a delinquent return started the three-year period of the predecessor to section 6501(a).

Section 6501(c)(3) provides that in the case of the failure to file a return, the tax may be assessed at any time. Section 6501(a) expressly applies to a return "whether or not such return was filed on or after the date prescribed." Thus, where a delinquent return is ultimately filed, section 6501(a) clearly applies and renders section 6501(c)(3) inapplicable. In cases such as *Bennett,* it follows that where taxpayers filed delinquent returns, the exception in section 6501(c)(3) by its own terms no longer applied and the three-year period in section 6501(a), by its express terms, began to run on the date the delinquent returns were filed, notwithstanding the fact that the initial failure to file was fraudulent.

Although the policy reasons stated above for allowing respondent an unlimited period to assert and prove fraud also apply to a fraudulent failure to file, Congress did not distinguish

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2. The "failure to file" described in section 6501(c)(3) may be fraudulent or nonfraudulent.

between fraudulent and nonfraudulent failures to file and specifically provided that, in the "no return" situation of section 6501(c)(3) the later filing of a delinquent return shall start the three-year period in section 6501(a). In the present case and in *Dowell v. Commissioner,*[3] however, the exception in section 6501(c)(1) is not rendered inapplicable by the filing of a nonfraudulent amended return. The statute does not say that subsequent events have any affect on the application of section 6501(c)(1) to a fraudulent original return.[4]

There is no language in section 6501 that requires respondent to assert a fraud penalty within three years of the filing of a fraudulent original or nonfraudulent amended return. As for statutory construction, the general rule is that a statute of limitations barring the collection of taxes otherwise admittedly due and owing is to be strictly construed in favor of the Government and its applicability will not be presumed in the absence of clear Congressional action. *Lucia v. United States,* 474 F. 2d 565, 570 (5th Cir. 1973); *McDonald v. United States,* 315 F. 2d 796, 801 (6th Cir. 1963).

Since section 6501 does not expressly limit respondent's time for asserting the fraud penalty, this Court should not impose its own limitation on the unlimited period already provided for asserting and proving the fraud penalty.

TANNENWALD, SCOTT, STERRETT, and CHABOT, *JJ.*, agree with this dissenting opinion.

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3. 614 F. 2d 1263 (10th Cir. 1980), rev'g. and rem'g. 68 T.C. 646 (1977).

4. See *Woolf v. United States,* 578 F. 2d 1103, 1105 (5th Cir. 1978).

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Nos. 82-1453 and 82-1509

IN THE

Supreme Court of the United States

October Term, 1983

ERNEST BADARACCO, SR., *et al.*,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DELEET MERCHANDISING CORP.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

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Petition for Certiorari Filed March 11, 1983
Certiorari Granted May 16, 1983

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ERNEST BADARACCO, SR., *et al.*,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PAPERS IN BADARACCO PROCEEDING.

Petition.

The above-named petitioners hereby petition for a redetermination of the deficiency in tax and the addition to the tax as set forth by the Commissioner of Internal Revenue in his statutory notice dated November 21, 1977, and as a basis for their proceeding allege as follows:

1. The petitioners reside at 403 Washington Street, Hoboken, New Jersey.

2. The tax return for the taxable year 1964 was timely filed.

3. The statutory notice (a copy of which is attached to this petition) was mailed to these petitioners on November 21, 1977.

4. The tax and additions to the tax which are in controversy are as follows:

Year	*Tax Deficiency*	*Addition to the Tax Sec. 6653(b), I.R.C. of 1954*
1964	$21,072.39	$10,536.20
1965	18,453.48	9,226.74
1966	19,996.21	9,998.11
1967	39,824.89	19,912.45
1968	49,832.86	24,916.43
1969	54,350.88	27,175.44

5. The determination of the respondent set forth in the statutory notice is based upon the following errors:

(a) The respondent has erroneously determined that for the taxable year 1964 the gross receipts of the partnership, Badaracco Bros. and Co. was understated in the amount of $67,110.50, and that consequently the petitioner, Ernest Bodaracco, understated his taxable income for the taxable year 1964 in the amount of $33,555.25.

(b) The amounts of the deficiencies for each of the taxable years 1965 to 1969 inclusive, upon which respondent has based the application of the addition to the tax under section 6653(b), *supra,* are incorrect.

(c) The respondent has erroneously determined the application of the addition to the tax as against the petitioner, Ernest Bodaracco, under section 6653(b), *supra,* for each of the taxable years 1964 to 1967, inclusive.

(d) The respondent has erroneously determined the existence of a deficiency in tax with respect to the taxable year 1964 in that said year is barred by reason of the application of Section 6501(a) of the Internal Revenue Code of 1954.

(e) The respondent has erroneously determined the existence of deficiencies in tax for each of the taxable years 1964 to 1969, inclusive, as against the petitioner, Rose Badaracco, in that he has failed to accord said petitioner the benefit of section 6013(e) of the Internal Revenue Code of 1954.

6. The facts upon which petitioners rely as a basis for this appeal are as follows:

Petition

(a) The petitioners did not fail to accurately report all of their taxable income for the taxable year 1964 to the best of their knowledge at the time of filing their return for said year.

(b) The employment of the bank deposit method by the respondent in reconstructing taxable income for the taxable year 1964 distorts the taxable income of the aforesaid partnership in that consideration has not been given to sums available from non-taxable sources.

(c) Petitioners filed amended returns for the taxable years 1965 to 1969, inclusive. When said returns were prepared and filed, errors were made with respect to taxable income. A more recent analysis of taxable income of the aforesaid partnership for said taxable years reconstructs less income than reported, which petitioners desire to present to this Court. Said revised income figures would also affect the computation of the addition to the tax under section 6653(b), *supra*.

(d) There was no intent on the part of the petitioner, Ernest Badaracco to wilfully evade or defeat payment of tax for any of the taxable years 1964 to 1969, inclusive.

(e) The tax return of the petitioner for the taxable year 1964 was timely filed and petitioners have not executed extensions of time with respect thereto as provided in section 6501(c)(4) of the Internal Revenue Code of 1954.

(1) By reason of the application of section 6501(a), *supra*, the time for assessment with respect to said year would have expired on April 15, 1968.

(2) The statutory notice of deficiency with respect to said year was not mailed to petitioners until November 21, 1977, which mailing was beyond the applicable three year statute of limitations set forth in section 6501(a), *supra.*

(f) The petitioner, Rose Badaracco, when she signed the joint returns for the taxable years in issue, did not have reason to know of any alleged omissions from gross income. Furthermore, said petitioner, Rose Badaracco, has never significantly benefited either directly or indirectly from any alleged omissions.

WHEREFORE, the petitioners pray that this Court may hear this proceeding and determine that respondent erred in determining additional tax due from these petitioners for the taxable year 1964; that respondent has erroneously determined additions to the tax for each of the taxable years in issue under section 6653(b), *supra;* that the amount of the tax shown upon the amended returns was erroneously computed; that the provisions of 6501(a), *supra,* are applicable to bar the assessment for the taxable year 1964; that in any event the petitioner, Rose Badaracco, is entitled to the relief provisions of section 6013(e), *supra;* and, for such other relief in the premises as this Court may determine proper.

Dated: February 16, 1978

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STARR, WEINBERG AND FRADKIN
744 Broad Street
Newark, New Jersey 07102
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Notice of Deficiency, Attached to Petition.

INTERNAL REVENUE SERVICE

DISTRICT DIRECTOR

Department of the Treasury

P.O. Box 270, Newark, N.J. 07101

Date: Nov 21 1977

Tax Year Ended and Deficiency: and

Addition To The Tax	
December 31, 1964	$31,608.59
December 31, 1965	$ 9,226.74
December 31, 1966	$ 9,998.11
December 31, 1967	$19,912.45
December 31, 1968	$23,920.61
December 31, 1969	$27,114.00

Person to Contact:

Mr. Davenport

Contact Telephone Number:

201-645-2350

See Attached Schedule

Notice of Deficiency, Attached to Petition

Mr. Ernest Badaracco, Sr. and
Mrs. Rose Badaracco
403 Washington Street
Hoboken, New Jersey 07030

Certified Mail

Dear Mr. and Mrs. Badaracco:

We have determined that there is a deficiency in your income tax as shown above. This letter is a NOTICE OF DEFICIENCY sent to you as required by law. The enclosed statement shows how we computed the deficiency.

If you wish to contest this deficiency in court before making any payment, you have 90 days from the above mailing date of this letter (150 days if addressed to you outside of the United States) to file a petition with the United States Tax Court for a redetermination of the amount of your tax. The petition should be filed with the United States Tax Court, 400 Second Street NW., Washington, D.C. 20217, and the copy of this letter should be attached to the petition. The time in which you must file a petition with the Court (90 or 150 days as the case may be) is fixed by law and *the Court cannot consider your case if your petition is filed late.* If this letter is addressed to both a husband and wife, and both want to petition the Tax Court, *both* must sign the petition or each must file a separate, signed petition.

If you decide not to file a petition with the Tax Court, we would appreciate it if you would sign and return the enclosed Statutory Notice Statement-Waiver. This will permit us to assess the deficiency quickly and will limit the accumulation of interest. The enclosed self-addressed envelope is for your convenience. If you decide not to sign and return the statement and you do not timely petition

the Tax Court, the law requires us to assess and bill you for the deficiency after 90 days from the above mailing date of this letter (150 days if this letter is addressed to you outside the United States).

If you have any questions, please contact the person whose name and telephone number are shown above.

Sincerely yours,

JEROME KURTZ
Commissioner
By CORNELIUS J. COLEMAN
District Director

Enclosures:
Copy of this letter
Statement-Waiver
Envelope

rw Letter 892(DO) (6-77)

Mr. Ernest Badaracco, Sr. and Mrs. Rose Badaracco

Schedule of Deficiencies And Additions To Tax

Year	*Deficiency*	*Fraud Addition Section 6653(b) IRC*	*Failure To Pay Tax Addition Section 6654 IRC*
December 31, 1964	$21,072.39	$10,536.20	0
December 31, 1965	0	9,226.74	0
December 31, 1966	0	9,998.11	0
December 31, 1967	0	19,912.45	0
December 31, 1968	0	24,916.43	(995.82)
December 31, 1969	0	27,175.44	(61.44)

Notice of Deficiency, Attached to Petition

DD/Newark

Form 4089 (Rev. June 1977)	Department of the Treasury – Internal Revenue Service Statutory Notice Statement - Waiver	Symbols AM:CC:90

Name and Address of Taxpayer(s)

Mr. Ernest Badaracco, Sr. and
Mrs. Rose Badaracco
403 Washington Street
Hoboken, New Jersey 07030

Kind of Tax: Income

[X] Copy to Authorized Representative
Starr, Weinberg and Fradkin
744 Broad Street
Newark, New Jersey 07102

Taxable Year Ended	Increase in Tax	Deficiency Fraud Addition Section 6653(b) IRC	Failure to Pay Addition Section 6654 IRC
December 31, 1964	$21,072.39	$10,536.20	-0-
December 31, 1965	-0-	9,226.74	-0-
December 31, 1966	-0-	9,998.11	-0-
December 31, 1967	-0-	19,912.45	-0-
December 31, 1968	-0-	24,916.43	($995.82)
December 31, 1969	-0-	27,175.44	(61.44)

See the attached explanation for the above deficiencies

I consent to the immediate assessment and collection of the deficiencies (increase in tax and penalties) shown above, plus any interest provided by law.

Your Signature ▶ ..... (Date signed)

Spouse's Signature, If A Joint Return Was Filed ▶ ..... (Date signed)

Taxpayer's Representative Sign Here ▶ ..... (Date signed)

Corporate Name: .....

Corporate Officers Sign Here ▶ ..... (Signature) (Title) (Date signed)

▶ ..... (Signature) (Title) (Date signed)

Note:

If you consent to the assessment of the amounts shown in this waiver, please sign and return it in order to limit the accumulation of interest and expedite our bill to you. Your consent will not prevent you from filing a claim for refund (after you have paid the tax) if you later believe you are entitled to a refund; nor prevent us from later determining, if necessary, that you owe additional tax; nor extend the time provided by law for either action.

If you later file a claim and the Internal Revenue Service disallows it, you may file suit for refund in a district court or in the United States Court of Claims, but you may not file a petition with the United States Tax Court.

Who Must Sign

If this waiver is for any year(s) for which you filed a joint return, both you and your spouse must sign the original and duplicate of this waiver form unless one of you, acting under a power of attorney, signs as agent for the other.

This waiver may be signed by your attorney or agent, provided such action is specifically authorized by a power of attorney which, if not previously filed, must accompany this form.

If this waiver is signed by a person acting in a fiduciary capacity (such as executor, administrator, trustee), Form 56, Notice of Fiduciary Relationship, should, unless previously filed, accompany this form.

If this waiver is for a corporation, it must be signed with the corporate name followed by the signature and title of the officer(s) authorized to sign.

If you agree, please sign one copy and return it; keep the other copy for your records.

Notice of Deficiency, Attached to Petition

Mr. Ernest Bardaracco, Sr. and
Mrs. Rose Bardaracco

Form 4089—Continued

All or part of the underpayment of tax required to be shown on the returns for the tax years December 31, 1964, December 31, 1965, December 31, 1966, December 31, 1967, December 31, 1968 and December 31, 1969, is due to fraud. Consequently, the 50 percent addition to the tax is charged for each of those years, as provided by section 6653(b) of the Internal Revenue Code. Since no part of the underpayment is due to fraud on the part of Rose Badaracco, this addition to the tax does not apply to her.

Since the fraud addition is being assessed under section 6653(b), the failure to pay tax addition previously assessed will be abated.

Notice of Deficiency, Attached to Petition

Form 5278 (January 1975)	Department of the Treasury - Internal Revenue Service Statement - Income Tax Changes	Return Form No. 1040	Schedule No.

Name of Taxpayer(s)

Mr. Ernest Badaracco, Sr. and Mrs. Rose Badaracco

☒ Notice of Deficiency ☐ Other (specify)

☐ Settlement Computation

	Tax Years Ended		
	December 31, 1964	**December 31, 1965**	**December 31, 1966**
1. Adjustments to income			
a. **Partnership Income - Badaracco Bros.**	**33,555.25**	**-0-**	**-0-**
b.			
c.			
d.			
e.			
f.			
g.			
2. Total adjustments	**33,555.25**	**-0-**	**-0-**
3a. ☒ Taxable income ☐ Adjusted gross income b. As shown in: ☐ Preliminary letter dated _____ ☐ Notice of deficiency dated _____ ☒ Return as filed	**73,678.96**	**122,830.50**	**121,283.70**
4. ☒ Taxable income as revised ☐ Adjusted gross income as revised	**107,234.21**	**122,830.50**	**121,283.70**
5. Tax	**52,654.58**	**59,391.52**	**58,401.57**
6. Alternative tax if applicable (from page _____)			
7. Tax surcharge			
8. Corrected tax liability (Lesser of line 5 or 6, plus line 7)	**52,654.58**	**59,391.52**	**58,401.57**
9. Less credits (specify) a. **Dividends Received Credit**	**168.07**		
b. **Investment Tax Credit**	**72.60**	**46.86**	**8.93**
c.			
10. Balance (line 8 less amounts on lines 9a through 9c)	**52,413.91**	**59,344.66**	**58,392.64**
11. Plus a. Tax from recomputing prior year investment credit			
b. Self-employment tax	**239.20**	**239.20**	**405.90**
c.			
12. Total corrected income tax liability (line 10 plus amounts on lines 11a through 11c)	**52,673.11**	**59,603.86**	**58,798.54**
13. Total tax shown on return or as previously adjusted	**31,600.72**	**59,603.86**	**58,798.54**
14. Statutory deficiency or overassessment (difference between lines 12 and 13)	**21,072.39**	**-0-**	**-0-**
15. Additions to the tax (listed below) **Fraud Addition - Section 6653(b) IRC**	**10,536.20**	**9,226.74**	**9,998.11**

Notice of Deficiency, Attached to Petition

Form 5278 (January 1975)	Department of the Treasury - Internal Revenue Service Statement - Income Tax Changes	Return Form No. 1040	Schedule No.

Name of Taxpayer(s):

Mr. Ernest Badaracco, Sr. and Mrs. Rose Badaracco

☒ Notice of Deficiency ☐ Other (specify)

☐ Settlement Computation

	Tax Years Ended		
	December 31, 1967	December 31, 1968	December 31, 1969
1. Adjustments to income			
a.			
b.			
c. NONE			
d.			
e.			
f.			
g.			
2. Total adjustments	-0-	-0-	-0-
3a. ☒ Taxable income ☐ Adjusted gross income b. As shown in: ☐ Preliminary letter dated ____ ☐ Notice of deficiency dated ____ ☒ Return as filed	139,932.03	183,297.93	168,649.81
4. ☒ Taxable income as revised ☐ Adjusted gross income as revised	139,932.03	183,297.93	168,649.81
5. Tax	83,535.14	99,455.57	89,461.87
6. Alternative tax if applicable (from page ____)			
7. Tax surcharge		7,459.17	8,946.19
8. Corrected tax liability (Lesser of line 5 or 6, plus line 7)	83,535.14	106,914.74	98,408.06
9. Less credits (specify) a. Investment Tax Credit	94.93	119.72	
b.			
c.			
10. Balance (line 8 less amounts on lines 9a through 9c)	83,440.21	106,795.02	98,408.06
11. Plus a. Tax from recomputing prior year investment credit		46.28	
b. Self-employment tax	422.40	499.20	538.20
c.			
12. Total corrected income tax liability (line 10 plus amounts on lines 11a through 11c	83,862.61	107,340.50	98,946.26
13. Total tax shown on return or as previously adjusted	83,862.61	107,340.50	98,946.26
14. Statutory deficiency or overassessment (difference between lines 12 and 13)	-0-	-0-	-0-
15. Additions to the tax (listed below)			
Fraud Addition - Section 6653(b) IRC	19,912.45	24,916.43	27,173.44
Failure To Pay Tax Addition - Section 6651 IRC		(995.82)	(61.44)

Notice of Deficiency, Attached to Petition

FORM 886-A (REV. APRIL 1960)	EXPLANATION OF ITEMS	SCHEDULE NO. OR EXHIBIT
NAME OF TAXPAYER		YEAR/PERIOD ENDED
Mr. Ernest Badaracco, Sr. and Mrs. Rose Badaracco		December 31, 1964-1969

Partnership Income

Your share of Badaracco Bros. and Co. partnership income for the year 1964 is $90,911.66 in lieu of $57,156.19 as reported on your return. Therefore, your taxable income is increased $33,755.25 under section 61 of the Internal Revenue Code.

See below for explanation of your share of the partnership adjustment:

a. Gross Receipts - 1964 (Badaracco Bros & Co.)

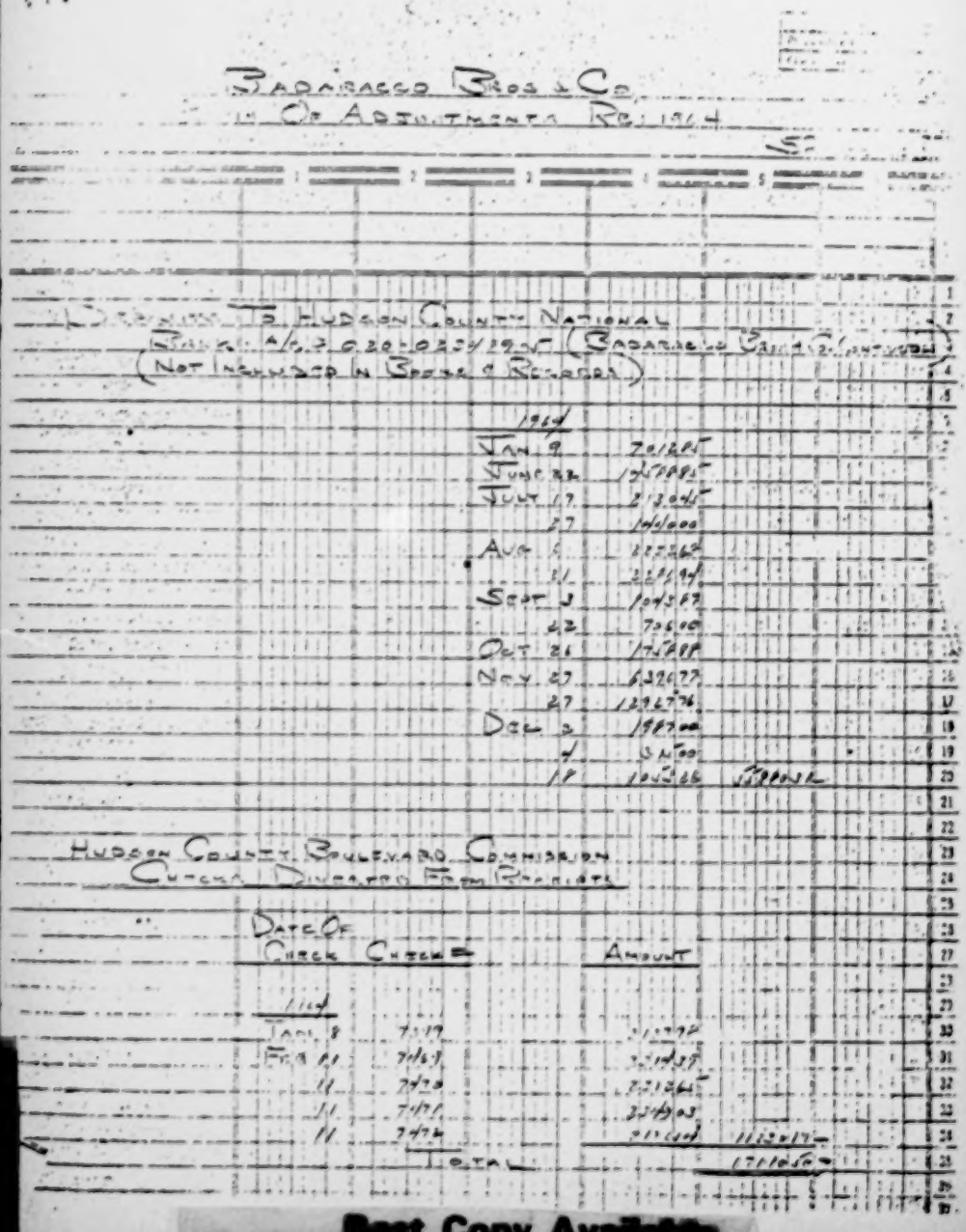
Per Return	$865,984.41
Per Credit	933,094.91
Adjustment	$ 67,110.50

Gross Receipts increased as follows:

1. Deposits into checking account #020-023489-5 Hudson County, National Bank - Not part of books and records	$55,580.31
2. Hudson County Boulevard Commission checks cashed	9,104.05
3. Hudson County Boulevard Commission checks used in payment of Notes Payable	2,126.14
Total Increase in Gross Receipts-(See Schedule I)	$67,110.50
X your percentage interest	50%
Increase in your income	$33,555.25

Best Copy Available

Notice of Deficiency, Attached to Petition



Badanasco Bros & Co.
In Re Adjustments For 1964

Deposits To Hudson County National Bank A/C 2 20-10-2324-27 (Badanasco Bros & Co. Hudson
(Not Included In Sworn Statement)

1964		
Jan 9	20,120.00	
June 22	10,000.00	
June 17	2,130.00	
27	10,000.00	
Aug 6	10,000.00	
11	2,000.00	
Sept 3	10,000.00	
22	7,000.00	
Oct 26	10,000.00	
Nov 27	6,320.00	
27	12,967.76	
Dec 2	10,000.00	
4	3,400.00	
18	10,000.00	Withdrawal

Hudson County Boulevard Commission
Checks Deducted From Receipts

Date Of Check	Check #	Amount	
1964			
Jan 8	7117	1,000.00	
Feb 21	7163	2,000.00	
11	7170	2,000.00	
11	7171	30,000.00	
11	7174	100,000.00	135,000.00
	Total		170,000.00

Best Copy Available

Notice of Deficiency, Attached to Petition

FORM 886-A (REV. APRIL 1958)	EXPLANATION OF ITEMS	SCHEDULE & NO. OR EXHIBIT
NAME OF TAXPAYER		YEAR/PERIOD ENDED
Mr. Ernest Badaracco, Sr. and Mrs. Rose Badaracco		December 31, 1964-1969

Fraud Addition

All or part of the underpayment of tax required to be shown on the returns for the tax years December 31, 1964, December 31, 1965, December 31, 1966, December 31, 1967, December 31, 1968 and December 31, 1969 is due to fraud. Consequently, the 50 percent addition to the tax is charged for each of those years, as provided by section 6653(b) of the Internal Revenue Code. Since no part of the underpayment is due to fraud on the part of Rose Badaracco, this addition to the tax does not apply to her.

See Below for computation:

	Fraud Addition
1964 - 50% of $21,072.39 (Form 5278, Line 14)	$10,536.20
1965 - 50% of additional tax due per amended return - $18,453.48	9,226.74
1966 - 50% of additional tax due per amended return - $19,996.21	9,998.11
1967 - 50% of additional tax due per amended return - $39,824.89	19,912.45
1968 - 50% of additional tax due per amended return - $49,832.86	24,916.43
1969 - 50% of additional tax due per amended return - $54,350.88	27,175.44

Failure To Pay Tax Addition

Since the fraud addition is being assessed under section 6653(b) of the Internal Revenue Code failure to pay tax addition previously assessed will be abated as shown below:

1968 - Decrease in failure to pay tax addition	$995.82
1969 - Decrease in failure to pay tax addition	41.44

Best Copy Available

Answer.

The Respondent, in answer to the petition filed in the above-entitled case, admits, denies and alleges as follows:

1. through 3. Admits the allegations of paragraph 1. through 3. of the petition.

4. Denies the allegations of paragraph 4. of the petition; alleges that the deficiencies in income tax and addition to the tax under I.R.C. §6653(b) in dispute for the years 1964 through 1969 are as follows:

	Deficiency	
Year	*Income Tax*	*Addition to the Tax I.R.C. §6653(b)*
1964	$21,072.39	$10,536.20
1965	—	$ 9,226.74
1966	—	$ 9,998.11
1967	—	$19,912.45
1968	—	$24,916.43
1969	—	$27,175.44

5. (a) through (e) Denies the allegations of subparagraphs (a) through (e) of paragraph 5. of the petition.

6. (a) through (d) Denies the allegations of subparagraphs (a) through (d) of paragraph 6. of the petition.

(e), (e) (1), and (e) (2) Admits the allegations of subparagraphs (e), (e) (1) and (e) (2) of paragraph 5. of the petition.

Answer

(f) Denies the allegations of subparagraph (f) of paragraph 5. of the petition.

7. Denies generally each and every allegation of the petition not hereinbefore specifically admitted, qualified or denied.

8. FURTHER ANSWERING the petition and in support of the determination that all or part of the underpayments of tax required to be shown on petitioners' income tax returns for the taxable years 1964 through 1969 are due, in whole or in part, to fraud, the respondent alleges:

(a) During the taxable years 1964 through 1969, Ernest Badaracco, Sr., hereinafter petitioner, was an equal partner in Badaracco Brothers & Co. (hereinafter Partnership).

(b) Petitioner caused the Partnership to maintain false and fraudulent books of account and records of the Partnership income essential for the determination of petitioners' correct taxable income liability for the years 1964 through 1969.

(c) Petitioner knew that the books and records of the Partnership were false and fraudulent for the years 1964 through 1969.

(d) For the taxable years 1964 through 1969 petitioner caused the Partnership to file federal income tax returns which failed to report income received as follows:

1964	$ 67,110.50
1965	$ 61,211.80
1966	$ 65,032.46

1967	$127,737.59
1968	$140,033.76
1969	$155,477.17

(e) For the taxable years 1964 through 1969 petitioners failed to report their fifty percent distributive share of the unreported income of the Partnership.

(f) (i) For the taxable years 1964 through 1969 the Partnership unreported taxable income was comprised of the following:

Exhibit #2 (Savings) Account
Civil Action 2496-3 Hudson County National Bank

	1941	1942	1943	1944	1945	1946
HUDSON COUNTY BOARD OF CHOSEN FREEHOLDERS		$18,462.63	$22,273.24	$34,998.83	$33,369.99	$31,971.84
ST. PAUL OF THE CROSS Jersey City, N. J.		-	-	16,676.80	16,928.00	6,663.89
ST. LAWRENCE CHURCH Weehawken, N. J.		-	2,089.00	9,062.10	3,884.90	-
BOARD OF EDUCATION Ridgefield, N. J.		4,784.00	-	-	-	-
CITY OF JERSEY CITY New Jersey		36.00	-	-	-	-
ST. MATTHIAS CHURCH Jersey City, N. J.		8,298.78	-	1,294.62	-	-
[illegible] PLANE HOUSE, INC. Elizabeth, N. J.		-	190.00	-	-	-
HUDSON COUNTY BOULEVARD [illegible]		2,194.33	-	-	-	-
[illegible] CATHOLIC ARCHDIOCESE [illegible] BUREAU (Secular) Dev.)		1,944.60	-	-	-	-
[illegible] TRUSTEE DEPOSIT Jersey City, N. J.		2,491.41	18,433.88	48,799.96	33,819.68	36,120.96
[illegible] Deposits	$88,000.31	22,917.64	22,914.64	19,889.62	84,136.41	61,888.88
[illegible] Check Fund Co. [illegible] Hospital	-	-	-	-	-	-
[illegible] Income						

Answer

(ii) In addition during the taxable year 1964 the Partnership's unreported taxable income was comprised of the following:

Hudson County Boulevard Commission

Checks cashed	$ 9,104.05
Checks applied in payment of Notes	2,126.14
Total Unreported Income	$11,230.19

(g) The books and records of the Partnership did not reflect checking account number 020-023489-5 at Hudson County National Bank (hereinafter Bank Account) or the income reflected therein nor the checks cashed or applied in payment of notes for the taxable years 1964 through 1969.

(h) (i) During the taxable years 1964 through 1969, the Partnership retained the services of a Certified Public Accountant who performed quarterly audits, closed the books yearly and prepared returns for the Partnership and the petitioners.

(ii) The tax returns of the Partnership and the petitioners for the taxable years 1964 through 1969 were prepared by said accountant based upon the books and records of the Partnership and from information furnished by petitioners.

Answer

(i) Prior to 1971 petitioner had kept secret the existence of the Bank Account, even from his accountant, into which taxable business receipts were deposited.

(j) The books and records of the Partnership were subpoenaed by Grand Juries impanelled June 9, 1970, June 11, 1970, November 11, 1970, June 14, 1971 and June 23, 1971 in connection with a probe of political corruption in Hudson County.

(k) In late February or early March, 1971 the petitioner contacted the accountant and revealed the secret business Bank Account and stated it was not recorded on the books and records of the Partnership and the receipts deposited therein were not reported.

(l) On August 17, 1971 amended returns were filed by the Partnership and the petitioners for the taxable years 1965 through 1969.

(m) The amended returns were prepared by the accountant from charts furnished by the petitioner for each of the taxable years 1965 through 1969, showing sales, sales of junk, accounts receivables and refunds.

(n) For the taxable years 1964 through 1969 petitioners filed original income tax returns reporting taxable income attributable to the Partnership as follows:

1964	$57,356.39
1965	$68,227.43
1966	$63,659.89
1967	$77,438.52
1968	$90,283.52
1969	$64,117.29

Answer

(o) On the amended returns filed by the petitioners for the taxable years 1965 through 1969, they reported taxable income attributable to the Partnership as follows:

1965	$ 98,127.87
1966	$ 94,659.66
1967	$138,694.69
1968	$157,958.10
1969	$137,756.37

(p) On the Partnership return for the year 1969 the Partnership improperly wrote off as uncollectible an accounts receivable with respect to JFK Office Building in the amount of $6,526.95.

(q) The petitioners fraudulently, and with intent to evade tax, omitted from their original income tax returns for the taxable years 1964 through 1969 their distributive share of unreported Partnership income, at least, in the amounts as follows:

1964	$33,555.25
1965	$29,900.44
1966	$30,999.77
1967	$61,256.62
1968	$67,674.58
1969	$73,639.08

(r) The petitioners fraudulently understated the tax due on their original income tax returns for the taxable years 1964 through 1969 at least in the amounts as follows:

1964	$21,072.39
1965	$18,453.48
1966	$19,996.21
1967	$39,824.89
1968	$49,832.86
1969	$54,350.88

(s) All or part of the understatement of tax required to be shown on the petitioners' original income tax returns for the taxable years 1964 through 1969 is due to fraud.

9. FURTHER ANSWERING the petition, and as a defense to the assignment of error that the statute of limitations bars the assessment and collection of the deficiency in income tax due from the petitioner for the taxable year 1964 the respondent alleges that the income tax due from the petitioner for the taxable year 1964 may be assessed or a proceeding in Court for the collection of such tax may be begun without assessment, at anytime under the provisions of I.R.C. §6501(c) (1), since the petitioner filed a false and fraudulent income tax return for said year with intent to evade tax, as is more fully set forth by the facts alleged in paragraph 8. above, which facts are incorporated by this reference and relied upon by the respondent as a defense to the statute of limitations issue.

10. FURTHER ANSWERING the petition and in support of the determination that a part of the underpayment of tax required to be shown on the income tax return of the petitioner Ernest Badaracco, Sr. for the taxable year 1967 is due to fraud by petitioner Ernest Badaracco, Sr., the respondent affirmatively relies upon the doctrine of collateral estoppel (estoppel by judgment) and alleges:

Answer

(a) Ernest Badaracco, Sr., petitioner herein, is the same person who was the defendant in the criminal case of *U.S. v. Ernest Badaracco, Sr. & Ernest Badaracco, Jr.*, (United States District Court for the District of New Jersey, Criminal Docket No. 766-71).

(b) The respondent herein is a party in privity with the United States of America, the prosecuting party in the aforesaid case in which petitioner Ernest Badaracco, Sr. herein was the defendant.

(c) The indictment in the case of *U.S. v. Ernest Badaracco, Sr., supra,* contained 15 counts. Petitioner pleaded guilty to the Third Court in the indictment.

(d) Count 3 of the indictment charged that on or about the 15th day of April, 1968, in the District of New Jersey,

ERNEST BADARACCO, SR.
and ERNEST BADARACCO, JR.

partners in Badaracco Bros. and Co., a partnership having its principal place of business in Hoboken, New Jersey, did willfully and knowingly make and subscribe and did willfully and knowingly cause to be made and subscribed, a U. S. Partnership Return of Income (Form 1065) for the calendar year 1967 for Badaracco Bros. and Co., a partnership, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the District Director at Newark, New Jersey, which said income tax return they did not believe to be true and correct as to every material matter in that it was stated on line

27, page 1 of the said income tax return that ordinary income was $154,876.13, whereas, as they then and there well knew and believed, ordinary income for the period reported was substantially in excess of $154,876.13. In violation of Section 7206(1), Internal Revenue Code; Title 26, United States Code, Section 7206(1) and Title 18, United States Code, Section 2.

(e) A finding of fact that the petitioner Ernest Badaracco, Sr. did willfully file a false partnership return for the taxable year 1967 in that Partnership income was understated was essential to support the finding by the Court that the defendant Ernest Badaracco, Sr. was guilty as charged in the aforementioned count of the indictment.

(f) One of the issues in the instant case is whether the addition to tax imposed by section 6653(b) should be imposed against the petitioner for the taxable year 1967 with respect to his individual joint income tax return.

(g) Said issue in the instant case is the same as the issue presented in the aforesaid criminal case and determined adversely to the petitioner, upon his plea of guilty, to the extent that the conviction on the charge contained in Count 3 of the indictment set forth above is dependent upon a finding that the petitioner did willfully and knowingly make and subscribe and did willfully and knowingly cause to be made and subscribed a Partnership return for the year 1967 in that petitioner understated the ordinary income of the Partnership which necessarily resulted in the understatement of petitioner's ordinary income reported on his individual income tax return.

Answer

(h) The prior criminal conviction of the petitioner Ernest Badaracco, Sr., upon his plea of guilty, under section 7206(1) for the taxable year 1967 is conclusive and binding on the petitioner. By reason thereof the petitioner is estopped in the instant case under the doctrine of collateral estoppel (estoppel by judgement) from denying herein that he did willfully and knowingly make and subscribe a false federal income tax return and that the items which are the basis for the allegations of fraud set forth in paragraph 8. herein were reportable as ordinary income in 1967.

WHEREFORE, it is prayed:

(1) That the relief sought in the petition be denied;

(2) That the deficiency in income tax for the year 1964, as set forth in the statutory notice, be in all respects approved;

(3) That the additions to the tax for the taxable years 1964 through 1969 under the provisions of section 6653(b) as set forth in the statutory notice, be in all respects approved;

(4) That the Court determine that the assessment and collection of the deficiency in income tax and addition to tax under section 6653(b), for the year 1964 as set forth in the statutory notice are not barred by the statute of limitations; and

(5) That the Court determine that petitioner Ernest Badaracco, Sr. is estopped under the doctrine of collateral estoppel (estoppel by judgment) from denying that he willfully and knowingly made and subscribed a false and

fraudulent income tax return for the taxable year 1967 and that he knew and believed that the ordinary income as set forth in paragraph 8. above was reportable by him in that year.

STUART E. SEIGEL
Chief Counsel
Internal Revenue Service
By: JOHN J. HOPKINS
Assistant Regional Counsel
Dated: 4/14/78

Of Counsel:

Robert L. Liken
Regional Counsel

James F. Kearney
Attorney
Internal Revenue Service
970 Broad Street, Room 904
Newark, New Jersey 07102
Tel. No. 201-645-2628

Certificate of Service

This is to certify that a copy of the foregoing paper was served on Edwin Fradkin, Esquire, Starr, Weinberg and Fradkin by mailing the same on Apr 14 1978 in a postage-paid wrapper addressed to him at 744 Broad Street, Newark, New Jersey, 07102.

Dated: Apr 14 1979

JAMES F. KEARNEY
Attorney

Reply to Answer.

The above-captioned petitioners, pursuant to Rule 37(a) of the Rules of Practice and Procedure Before This Court, in reply to the affirmative allegations pleaded by respondent in his answer in this case admit and deny and aver as follows:

4. Deny the allegation set forth in paragraph 4 of respondent's answer. Allege that the deficiencies in dispute are as set forth in paragraph 4 of the petition.

8(a) Admit the allegation set forth in subparagraph (a) of paragraph 8 of respondent's answer.

8(b) through (g), inclusive. Deny the allegations set forth in subparagraphs (b) through (g), inclusive, and subparagraphs thereof, of paragraph 8 of respondent's answer.

8(h)(i) and (ii). Admit the allegations set forth in subparagraphs (h)(i) and (ii) of paragraph 8 of respondent's answer.

8(i). Deny the allegation set forth in subparagraph (i) of paragraph 8 of respondent's answer.

8(j). Admit the allegation set forth in subparagraph (j) of paragraph 8 of respondent's answer.

8(k). Deny the allegation set forth in subparagraph (k) of paragraph 8 of respondent's answer.

8(l). Admit the allegation set forth in subparagraph (l) of paragraph 8 of respondent's answer.

Reply to Answer

8(m). Aver that at the present time they have no knowledge of the manner of preparation by the accountant.

8(n) and (o). Admit the allegations set forth in subparagraphs (n) and (o) of paragraph 8 of respondent's answer.

8(p) through (s), inclusive. Deny the allegations set forth in subparagraphs (p) through (s), inclusive, of paragraph 8 of respondent's answer.

9. Deny the allegations set forth in paragraph 9 of respondent's answer.

10. Deny that the doctrine of collateral estoppel is applicable in this proceeding. *cf. United States v. Anderson,* (U.S.D.C., W.D. Ark. 1966), 254 F.S. 177, 66-1 USTC para. 9441. Also aver that a plea as to a violation under section 7206(1) of the Internal Revenue Code of 1954 does not operate as collateral estoppel to an alleged addition to the tax under section 6653(b) of the Internal Revenue Code of 1954 in that the subject matter of the sections are not identical.

(a) to (d), inclusive. Admit the fact set forth in subparagraphs (a) to (d), inclusive, of paragraph 10 of respondent's answer.

(e). Subparagraph (e) of paragraph 10 of respondent's answer sets forth a legal conclusion to which petitioners need not file an affirmance or denial.

Reply to Answer

(f). Admit the fact set forth in subparagraph (f) of paragraph 10 of respondent's answer.

(g). Deny the factual allegations set forth in subparagraph (g) of paragraph 10 of respondent's answer.

(h) Subparagraph (h) of paragraph 10 of respondent's answer sets forth a legal conclusion to which petitioners need not file an affirmance or denial.

WHEREFORE, it is prayed that the affirmative relief sought by the respondent in his answer be denied and that the Court give relief in accordance with the prayer set forth by petitioners in their answer.

Dated: May 25, 1978

JOHN J. O'TOOLE

STARR, WEINBERG and FRADKIN,
744 Broad Street
Newark, New Jersey 07102
(201) 623-5346

Amendment to Petition.

. 5(f) The respondent has erroneously determined the existence of the application of the additions to the tax under section 6653(b) of the Internal Revenue Code of 1954 to the taxable years 1965 to 1969, inclusive, in that said years are barred as to assessment by reason of section 6501(a) and 6659(a) of the Internal Revenue Code of 1954.

6(g)(1) The petitioners filed original returns for each of the taxable years as follows:

Year	*Date Filed*
1965	4/15/66
1966	4/15/67
1967	4/15/68
1968	5/28/69
1969	4/15/70

(a) The respondent has determined these said returns were fraudulent in nature under section 6653(b), *supra.*

(2) Subsequent to the filing of said original returns the petitioners filed non-fraudulent amended returns for each of the taxable years 1965 to 1969, inclusive, on August 17, 1971.

(3) The statutory notice addressed to the petitioners was issued on November 21, 1977.

(4) The issuance of the said statutory notice was beyond the three year statute of limitations provided in section 6501(a), *supra*, as such would be applied to the aforesaid filing of the non-fraudulent amended returns.

Amendment to Petition

(5) Section 6659(a), *supra*, provides that the addition to the tax under section 6653(b), *supra*, shall be assessed in the same manner as the tax.

(6) By virtue of the provisions of section 6659(a), *supra*, section 6501(a), *supra*, is applicable to the determination of the addition to the tax under section 6653(b), *supra*.

(7) Because of the application of section 6501(a), *supra*, to the non-fraudulent returns, the determination of the respondent as to the imposition of the addition to the tax under section 6653(b), *supra*, as set forth in the statutory notice is erroneous.

WHEREFORE, it is prayed that in addition to the relief requested in the petition, this Court determine that section 6501(a) *supra*, is applicable to bar the imposition of the addition to the tax under section 6653(b), *supra*, as to each of the taxable years 1965 to 1969, inclusive.

Dated: March 12, 1981

JOHN J. O'TOOLE

STARR, WEINBERG and FRADKIN,
744 Broad Street
Newark, New Jersey 07102
(201) 623-5346

Answer to Amendment to Petition.

THE RESPONDENT, in answer to the amendment to the petition filed in the above-entitled case, admits, denies and alleges as follows:

5(f). Denies the allegations set forth in subparagraph (f) of paragraph 5. of the amendment to the petition.

6(g)(1) through (g)(3). Admits the allegations contained in subparagraphs (g)(1) through (g)(3) of the amendment to the petition.

6(g)(4). Denies the allegations contained in subparagraph (g)(4) of paragraph 6. of the amendment to the petition.

6(g)(5). Admits the allegations contained in subparagraph (g)(5) of paragraph 6. of the amendment to the petition.

6(g)(6) and (g)(7). Denies the allegations contained in subparagraphs (g)(6) and (g)(7) of the amendment to the petition.

7. Denies generally each and every allegation of the amendment to the petition not hereinbefore specifically admitted, qualified or denied.

11. FURTHER ANSWERING the amendment to the petition, and as a defense to the assignment of error raised in the amendment to the petition that the statute of limitations bars the assessment and collection of the additions to the tax pursuant to I.R.C. §6653(b) due from petitioner, Ernest Badaracco, Sr., for the taxable years 1965 through

1969, the respondent alleges that the additions to the tax due from the petitioner for the taxable years 1965 through 1969 may be assessed or a proceeding in Court for the collection of such additions to the tax may be begun without assessment, at anytime under the provisions of I.R.C. section 6501(c)(1) and section 6659, since the petitioner filed false and fraudulent income tax returns for said years with intent to evade tax, as is more fully set forth by the facts alleged in paragraph 8. of the answer filed in this case, which facts are incorporated by this reference and relied upon by the respondent as a defense to the statute of limitations issue.

WHEREFORE, it is prayed: (6) That the Court determine that the assessment and collection of the additions to the tax pursuant to I.R.C. section 6653(b) for the taxable years 1965 through 1969 as set forth in the statutory notice are not barred by the statute of limitations.

EMORY L. LANGDON
Acting Chief Counsel
Internal Revenue Service

By: EDWARD H. HANCE
District Counsel

Dated: 3-13-81

Of Counsel:

David E. Gaston
Regional Counsel

Robert B. Marino
Attorney
Internal Revenue Service
970 Broad Street—Room 904
Newark, New Jersey 07101
Tel. No. (201) 645-3348

Stipulation for Trial (Docket Nos. 1700-78 and 1701-78).

In accordance with Tax Court Rule 91, the below-signed parties agree to this Stipulation For Trial pursuant to the general terms of this preamble, unless specifically expressed otherwise. All stipulated facts shall be conclusive. All stipulated exhibits shall be considered authentic. All copies shall be considered electronic reproductions of the originals and shall be treated as if originals.

1. With respect to Docket No. 1700-78, the parties agree that there is a deficiency in income tax due from the petitioners for the taxable year 1964 in the amount of $21,072.39.

2. With respect to Docket No. 1700-78, the parties agree that there is an addition to the tax pursuant to I.R.C. §6653(b) due from Ernest Badaracco, Sr. for the taxable year 1964 in the amount of $10,536.20.

3. With respect to Docket No. 1701-78, the parties agree that there is a deficiency in income tax due from the petitioners for the taxable year 1964 in the amount of $20,331.07.

4. With respect to Docket No. 1701-78, the parties agree that there is an addition to the tax pursuant to I.R.C. §6653(b) due from Ernest Badaracco, Jr. for the taxable year 1964 in the amount of $10,165.54.

5. With respect to Docket No. 1700-78, Ernest Badaracco, Sr. concedes that, subject to the resolution of the issue noted in paragraph 7, *infra*, the underpayments of tax for the taxable years 1965 through 1969 are due to fraud within the meaning of I.R.C. §6653(b) and are in the following amounts:

Year	*Addition Under I.R.C. §6653(b)*
1965	$ 9,226.74
1966	9,998.11
1967	19,912.45
1968	24,916.43
1969	27,175.44

6. With respect to Docket No. 1701-78, Ernest Badaracco, Jr. concedes that, subject to the resolution of the issue noted in paragraph 7, *infra*, the underpayments of tax for the taxable years 1965 through 1969 are due to fraud within the meaning of I.R.C. §6653(b) and are in the following amounts:

Year	*Addition Under I.R.C. §6653(b)*
1965	$ 8,775.99
1966	9,071.82
1967	18,969.97
1968	23,304.95
1969	24,503.43

7. The sole issue which the petitioners in both dockets present to the Court is whether the filing of non-fraudulent amended returns, subsequent to having filed fraudulent returns, entitles them to the statutory period of three years as provided in section 6501(a) of the Internal Revenue Code of 1954.

8. The petitioners filed original income tax returns on the following dates:

Stipulation for Trial (Docket Nos. 1700-78 and 1701-78)

(a) Ernest Badaracco, Sr.

Taxable Year	*Date Filed*
1965	4/15/66
1966	4/15/67
1967	4/15/68
1968	5/28/69
1969	4/15/70

(b) Ernest Badaracco, Jr.

Taxable Year	*Date Filed*
1965	4/15/66
1966	4/15/67
1967	4/15/68
1968	5/28/69
1969	4/15/70

9. The petitioners, for purposes of this case, concede the fraudulent nature of the original returns in the amounts as set forth in paragraphs 5. and 6., *supra*.

10. The petitioners, subsequent to the filing of the original returns, filed non-fraudulent amended returns for each of their taxable years 1965 to 1969, inclusive, on August 17, 1971.

11. The statutory notices of deficiency in each of these cases were issued on November 21, 1977.

Stipulation for Trial (Docket Nos. 1700-78 and 1701-78)

12. The additions to the tax in this case, in the matter involving both petitioners for each of the taxable years 1965 to 1969, inclusive, are calculated upon the underpayments shown on the amended returns.

JOHN J. O'TOOLE
Counsel for Petitioners

Dated: 3-12-81

EMORY L. LANGDON
Acting Chief Counsel
Internal Revenue Service

By: EDWARD H. HANCE
District Counsel
970 Broad Street—Room 904
Newark, New Jersey 07102
Tel. No. (201) 645-3348

Dated: 3-12-81

Order and Decision Entered on August 11, 1981 (Docket No. 1700-78).

For cause, it is

ORDERED that the Decision entered August 6, 1981, in this case is hereby vacated and set aside. Pursuant to the determination of the Court, as set forth in its T.C. Memo. 1981-404, filed August 5, 1981, it is

ORDERED AND DECIDED: That there is a deficiency in petitioners' Federal income tax for the taxable year 1964 in the amount of $21,072.39, and an addition to tax for the taxable year 1964 in the amount of $10,536.20. It is further

ORDERED AND DECIDED: That there are no additions to tax pursuant to section 6653(b), Internal Revenue Code of 1954, due from petitioners for the years 1965 through 1969.

EDNA G. PARKER
Judge

Entered: Aug 11, 1981

Order and Decision Entered on August 11, 1981 (Docket No. 1701-78).

For cause, it is

ORDERED that the Decision entered August 6, 1981, in this case is hereby vacated and set aside. Pursuant to the determination of the Court, as set forth in its T.C. Memo. 1981-404, filed August 5, 1981, it is

ORDERED AND DECIDED: That there is a deficiency in petitioners' Federal income tax for the taxable year 1964 in the amount of $20,331.07, and an addition to tax for the taxable year 1964 in the amount of $10,165.54. It is further

ORDERED AND DECIDED: That there are no additions to tax pursuant to section 6653(b), Internal Revenue Code of 1954, due from petitioners for the years 1965 through 1969.

EDNA G. PARKER
Judge

Entered: Aug 11, 1981

DELEET MERCHANDISING CORP.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Papers in Deleet Merchandising Corp. Proceeding.

Docket Entries.

Civil 80-26

DATE	NR	PROCEEDINGS
1-4-80	1	Complaint and *Jury Demand* filed.
1-4-80		Summons issued. (60 days)
1-4-80	2	Notice of Allocation and Assignment filed. (Newark-Biunno)
1-28-80	3	Summons returned served on the Internal Revenue Service and on the U.S. Attorney on 1-9-80 and on the U.S. Attorney General on 1-14-80, filed.
3-24-80	4	*Answer*, filed 3-21-80.
4-15-80	5	Plaintiff's First Request for production of documents, filed.
4-15-80	6	Plaintiff's First set of interrogatories, filed.
5-12-80	7	Notice of motion by defendant to dismiss the complaint ret. 6-9-80 and certificate of service, filed 5-9-80. (Brief submitted)
6-10-80		At call for hearing on motion of defendant to dismiss the complaint, court reported motion withdrawn. (Biunno) (6-9-80)
6-19-80	8	Stipulation and order adjourning defendant's motion for summary judgment to September 22, 1980, filed. (Biunno) Notice mailed.
9-26-80	9	Defendant's Preliminary interrogatories, filed 9-25-80.
9-30-80	10	*Pre-Trial order*, filed. (Cowen) Notice mailed. (directing plaintiff to answer defendant's interrogatories by

		December 1, 1980, etc.; and extending discovery to Feb. 1, 1981)
10-9-80	11	Second Request for Plaintiff for production of documents filed 10-6-80.
10-9-80	12	Second Set of Interrogatories of Plaintiff filed 10-6-80.
10-17-80	13	Answers of Defendant to Plaintiff's First Set of Interrogatories filed 10-16-80.
10-17-80	14	Answers of Defendant to Plaintiff's First Request for Production of Documents filed 10-16-80.
11-10-80	15	Answers of defendant to plaintiff's second set of interrogatories, filed 11-7-80.
11-10-80	16	Answers of defendant to plaintiff's second request for production of documents, filed 11-7-80.
12-10-80	17	Stipulation and order adjourning plaintiff's motion to compel answers to interrogatories, etc. to February 23, 1981, filed 12-9-80. (Biunno) Notice mailed.
11-23-81	18	Notice of motion of plaintiff for summary judgment, returnable 12-14-81 and affidavit of Barry I. Fredericks and affidavit of service, filed 11-20-81. (Brief submitted)
12-1-81	19	Memorandum, filed. (Biunno) (directing parties to review questions and have answers by Dec. 14, 1981)
12-4-81	20	Copy of Order of Reassignment to JUDGE FISHER filed. (Fisher) Notice mailed.

Docket Entries

12-11-81		Affidavit of Edward Sussman, filed 12-10-81.
12-15-81		Hearing on motion by plaintiff for summary judgment. Ordered motion granted. Order to be submitted. (Fisher) (12-14-81)
12-23-81	22	Opinion filed 12-22-81. (Fisher) (Motion of plaintiff for summary judgment granted.) (Copy to NJLJ)
12-23-81	23	*Order granting summary judgment for $114,193.83,* with costs in favor of plaintiff, Deleet Merchandising Corporation and against defendant, United States of America, filed 12-22-81. (Fisher) Notice mailed.
1-21-82	24	Notice of plaintiff to tax costs and verified bill of costs, filed.
2-19-82	25	Notice of appeal by defendant, filed 2-18-82 at 4:45 P.M.
2-19-82		Copies of notice of appeal sent to U.S.C.A. and Fredericks & Messinger Esqs.
2-26-82	26	Taxation of Plaintiff's Costs in the Sum of $80.00 filed. Notice mailed.

Complaint and Jury Demand.

Plaintiff Deleet Merchandising Corp., by its attorneys, Fredericks & Messinger, and Goldschmidt, Fredericks, Kurzman & Oshatz, for its complaint, alleges as follows:

JURISDICTION

1. The plaintiff Deleet Merchandising Corp. (hereinafter sometimes referred to as "Deleet") is a corporation duly organized and existing under the laws of the State of New Jersey, with its principal place of business at 26 Blanchard Street, Newark, New Jersey, 07105.

2. The defendant the United States of America, through its agents, the Secretary of the Department of the Treasury and the Commissioner of the Internal Revenue Service, is charged with and responsible for the collection of income tax due to the federal government by the plaintiff.

3. This is an action instituted pursuant to and jurisdiction arises under the provisions of 28 U.S.C. Section 1346(a) (1) for the recovery of Income Taxes, and penalties, erroneously or illegally assessed or collected from the plaintiff.

AS AND FOR ITS FIRST CAUSE OF ACTION

4. The plaintiff Deleet timely filed its Income Tax Return with the Internal Revenue Service Center at Holtsville, New York, and paid the tax shown to be due thereon in the amount of $5,233.05 for the taxable year ending December 31, 1967.

5. Thereafter, the plaintiff Deleet timely filed an Amended Income Tax Return for the year 1967 with the District Director of Internal Revenue at Newark, New Jersey, and requested the refund shown to be due thereon in the amount of $6,206.00 (A copy of that Amended Income Tax Return is attached hereto and marked Exhibit "A".)

6. Plaintiff Deleet received a notice dated December 14, 1979, stating that its claim for refund was disallowed, and that a deficiency for the year 1967 in the amount of $25,248.00 and penalties in the amount of $13,356.00 were assessed against the plaintiff Deleet.

7. On or about December 27, 1979, plaintiff Deleet paid the deficiency together with penalties for a total payment of $38,604.00.

8. The action of the defendant, through its agents, the Secretary of the Department of Treasury and the Commissioner of the Internal Revenue Service, in assessing and collecting the deficiency and penalties referred to in Paragraph 6 was improper, illegal and erroneous.

9. Therefore, the plaintiff Deleet has overpaid Income Tax for the year 1967 in the amount of $38,604.00, which amount, together with interest as provided by law, are due and owing to the plaintiff Deleet from the defendant.

10. Plaintiff Deleet is the sole owner of the aforesaid claim for refund and has made no assignment of said claim.

AS AND FOR ITS SECOND CAUSE OF ACTION

11. Plaintiff Deleet repeats and realleges each and every allegation heretofore set forth in paragraphs 1, 2 and 3, as if more fully set forth at length herein.

12. The plaintiff Deleet timely filed its 1968 income tax return with the Internal Revenue Service Center at Holtsville, New York, and paid the tax shown to be due thereon in the amount of $4,242.46, for the taxable year ending 1968.

13. Thereafter, the plaintiff Deleet timely filed an Amended Income Tax Return claiming a refund for the year 1968 with the District Director of Internal Revenue at Newark, New Jersey, and paid the tax shown to be due thereon in the amount of $36,608.00. (A copy of the amended Income Tax Return is attached hereto and marked Exhibit "B".)

14. Plaintiff Deleet received a notice dated December 14, 1979, stating that its claim for refund was disallowed and that there was a deficiency for the year 1968 in the amount of $36,314.01, and penalties in the amount of $39,275.82 were assessed against the plaintiff Deleet.

15. On or about December 27, 1979, plaintiff Deleet paid the deficiency together with penalties in the amount of $39,275.82, or a total payment of $75,589.83.

16. The action of the defendant, through its agents, the Secretary of the Department of Treasury and the Commissioner of the Internal Revenue Service in assessing and collecting the deficiency, and penalties referred to in Paragraph 14 was improper, illegal and erroneous.

17. Therefore, the plaintiff has overpaid its income tax for the year 1968 in the amount of $75,589.83, which amount together with interest as provided by law, are due and owing to the plaintiff from the defendant.

18. Plaintiff is the sole owner of the aforesaid claim for refund and has made no assignment of said claim.

WHEREFORE, plaintiff prays that judgment be entered in its favor as follows:

A. As and for its First Cause of Action: $38,604.00, with interest as provided by law; and

B. As and for its Second Cause of Action: $75,589.83, with interest as provided by law; and

Such other further and different relief as to the Court may appear just and proper.

FREDERICKS & MESSINGER
Attorneys for Plaintiff Deleet
Merchandising Corp.

By (Illegible)
A Member of the Firm
39 Hudson Street
Hackensack, New Jersey 07601
(201) 489-7171

and

GOLDSCHMIDT, FREDERICKS,
KURZMAN & OSHATZ
655 Madison Avenue
New York, New York 10021
(212) 838-2424

Jury Demand

Plaintiff Deleet Merchandising Corp. hereby Demands a Trial by Jury.

FREDERICKS & MESSINGER
Attorneys for Deleet Merchandising Corp.

By (Illegible)
A Member of the Firm

Answer.

Comes now the defendant, the United States of America, by its attorney, Robert J. Del Tufo, and answers the plaintiff's complaint as follows:

FIRST DEFENSE

1. The defendant is without information or knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 of the complaint.

2. The defendant admits the allegations contained in Paragraph 2 of the complaint.

3. Jurisdiction exists, if at all, pursuant to 28 U.S.C., Section 1346(a) (1). The defendant denies any income taxes and penalties have been erroneously or illegally assessed or collected from the plaintiff.

4-7. The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 4 through 7 of the complaint.

8 and 9. The defendant denies the allegations contained in Paragraphs 8 and 9 of the complaint.

10. The defendant is without information or knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraph 10 of the complaint.

11. The defendant repeats each and every answer heretofore set forth in Paragraphs 1, 2 and 3.

Answer

12-15. The defendant is without information or knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraphs 12 through 15 of the complaint.

16 and 17. The defendant denies each and every allegation of fact contained in Paragraphs 16 and 17 of the complaint.

18. The defendant is without information or knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraph 18 of the complaint.

SECOND DEFENSE

1. The defendant avers that the plaintiff, Deleet Merchandising Corporation, filed false and fraudulent income tax returns for the calendar years 1967 and 1968, with the intent to evade and defeat federal taxes.

2. The fraud committed by the plaintiff, Deleet Merchandising Corporation, consisted of willfully and knowingly filing false and fraudulent federal income tax returns for the calendar years 1967 and 1968 with the intent to evade and defeat taxes, and in willfully and knowingly failing to report on its 1967 and 1968 federal income tax returns amounts of taxable income received by it, and/or by unlawfully reducing the amount of taxable income reported by it with the intent to evade federal taxes.

WHEREFORE, the defendant prays that the plaintiff's complaint be dismissed with prejudice, that the defendant be awarded its costs in this action and the Court grant the defendant any other relief that it deems just and proper.

ROBERT J. DEL TUFO
United States Attorney

By: ANNE C. SINGER
Assistant United States Attorney

Of Counsel:
STEPHEN T. LYONS
Trial Attorney
Tax Division
Department of Justice
Washington, D. C. 20530

[Certificate of Service omitted]

Notice of Motion for Summary Judgment in Favor of Plaintiff.

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Barry I. Fredericks, Esq., sworn to the 19th day of November, 1981, plaintiff will move this Court before the Honorable Vincent P. Biunno, at the United States District Court, United State Courthouse & Post Office Building, Newark, New Jersey 07102, on the 14th day of December, 1981 at 10:00 o'clock in the forenoon of that day or at such other time and place as the Court may determine for an Order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting summary judgment in favor of plaintiff, on the grounds that defendant's Notice of Deficiency was untimely under 26 U.S.C. §6501 and there are no material issues of fact in controversy and plaintiff is entitled to judgment as a matter of law, and for such other and further relief as may be proper under the circumstances.

Dated: November 19, 1981

Yours, etc.,

FREDERICKS & MESSINGER

By: (Illegible)
A Member of the Firm
Attorneys for Plaintiff
39 Hudson Street
Hackensack, N.J. 07631
(201) 487-7949

Notice of Motion for Summary Judgment in Favor of Plaintiff

To:

William W. Robertson
United States Attorney
U.S. Courthouse & Post Office Building
Newark, N. J. 07102

Stephen T. Lyons, Esq.
Tax Division
Department of Justice
Washington, D.C. 20530

Affidavit of Barry I. Fredericks in Support of Motion.

State of New Jersey,
County of Bergen, ss:

BARRY I. FREDERICKS, being duly sworn, deposes and says:

1. I am a member of the law firms of Fredericks & Messinger, and Goldschmidt, Fredericks & Oshatz, attorneys for the plaintiff herein. We make this motion for an order granting plaintiff summary judgment against defendant pursuant to Rule 56 of the Federal Rules of Civil Procedure on the grounds that there are no material issues of fact and that plaintiff is entitled to judgment as a matter of law.

2. The undisputed facts are set forth in plaintiff's brief submitted herewith pursuant to Rule 12(F) of the Rules of this Court. Briefly stated these undisputed facts reveal that plaintiff timely filed its Income Tax Returns for the taxable years ending December 31, 1967 and December 31, 1968 with the Internal Revenue Service Center at Holtsville, New York. Plaintiff paid the tax shown to be due on said Income Tax Returns in the amount of $5,233.05 for 1967, and $36,608.00 for 1968.

3. Thereafter, on August 9, 1973 the plaintiff timely filed Amended Income Tax Returns for the years 1967 and 1968 with the District Director of Internal Revenue at Newark, New Jersey. (Copies of these amended returns are annexed hereto as Exhibits "A" and "B"). Plaintiff requested a refund of $6,206.00 shown to be due plaintiff for 1967, and paid $36,314.01 shown to be due defendant for 1968.

Affidavit of Barry I. Fredericks in Support of Motion

4. Plaintiff received a Notice of Deficiency, dated December 14, 1979 (hereinater the "Notice", a copy of which is annexed hereto as Exhibit "C"). The Notice stated *inter alia* that plaintiff's claim for a refund for 1967 was disallowed, and that a deficiency for that year, in the amount of $25,248.00 and penalties in the amount of $13,356.00 were assessed against said plaintiff. The Notice also stated that plaintiff's claim for a refund for 1968 was disallowed and that there was assessed a deficiency for that year against plaintiff in the amount of $36,314.01, as well as penalties in the amount of $39,275.82.

5. On or about December 27, 1979, plaintiff paid the assessed deficiencies and penalties for 1967 and 1968 in the amount of $114,193.83.

6. No extensions of the Statute of Limitations for the years in question were requested by the Government nor granted by the plaintiff.

7. On or about January 8, 1980 plaintiff filed its summons and complaint (copies of which are annexed hereto as Exhibit "D") seeking judgment in the amounts allegedly improperly and illegally assessed by defendant.

8. On or about March 10, 1980 defendant filed its answer (a copy of which is annexed hereto as Exhibit "E").

9. As set forth in the accompanying memorandum of law, a Notice of Deficiency must be issued within the statutory three-year period commencing with the filing of the taxpayer's amended return. In the case at bar, the Notice of Deficiency assessing the taxes and penalties herein, was made more than six (6) years after the filing of

plaintiff's amended returns. Therefore, the assessments were untimely under 26 U.S.C. §650 and were improperly and illegally made.

10. Although the cases cited in the accompanying brief are clearly dispositive of the issues presented herein. There are certain relevant facts which are even more favorable to plaintiff herein. In both the *Dowell* case, decided by the Tenth Circuit Court of Appeals, and the *Badaracco* case, decided by the Tax Court, each petitioner was the subject of a criminal investigation the subject of which was his alleged original fraudulent tax return. In fact, it is clear that the motivation for filing the amended non-fraudulent returns in each of these cases was the pendency of the criminal investigation. In the instant case, plaintiff *voluntarily* and without governmental pressure of any type filed amended returns in 1973 notwithstanding that the statute of limitations had already run for the years in question.

11. Defendant's counsel has indicated that the government will attempt to persuade this Court to defer a decision on this motion pending resolution by the Third Circuit Court of Appeals of an appeal taken by the government in the *Badaracco* case. However, since the taxpayer in *Badaracco* was the subject of a criminal indictment, that case is distinguishable from this one. Plaintiff submits that the government's appeal in this case should be consolidated with the *Badaracco* appeal. If the appeal in this case is heard after a reversal of *Badaracco*, plaintiff might suffer substantial prejudice.

WHEREAS, plaintiff respectfully requests that this Court issue an Order granting summary judgment in favor of plaintiff on the first and second causes of action in the complaint, and such other relief which is just and proper.

(Sworn to by Barry I. Fredericks, November 19, 1981.)

Exhibit A, Annexed to Affidavit of Barry I. Fredericks—Amended Corporate Income Tax Return for 1967.

Form 1120 — U.S. Corporation Income Tax Return — 1967

U.S. Treasury Department, Internal Revenue Service

For the calendar year January 1–December 31, 1966, or other taxable year beginning _____, 1966, ending _____, 19__

(PLEASE TYPE OR PRINT)

Check if: A Sale, transfer, etc. ☐ or partnership ☐ (enter name, etc.) to be taxed as a corporation. B Consolidated return ☐ C Personal Holding Co. ☐ D Business Code No. (see instr.)

Name: DELEET MERCHANDISING CORP

E Employer Identification No.: 13-1972794

Number and street: 26 BLANCHARD ST.

F County in which located:

City or town, State, and ZIP code: NEWARK N.J.

G Enter total assets from line 14 Sch. L (see instruction 6)

IMPORTANT—All applicable lines and schedules must be filled in. If the lines on the schedules are not sufficient, see instruction Q.

GROSS INCOME

1	Gross receipts or gross sales _____ Less: Returns and allowances _____	1,616,961
2	Less: Cost of goods sold (Schedule A) and/or operations (attach schedule)	1,153,908
3	Gross profit	463,053
4	Dividends (Schedule C)	
5	Interest on obligations of the United States and U.S. instrumentalities	
6	Other interest	
7	Rents	
8	Royalties	
9	Net gains (losses)—(separate Schedule D)	
10	Other income (attach schedule)	
11	TOTAL income—Add lines 3 through 10	463,053

DEDUCTIONS

12	Compensation of officers (Schedule E)	105,150
13	Salaries and wages (not deducted elsewhere)	
14	Repairs (do not include cost of improvements or capital expenditures)	
15	Bad debts (Schedule F if reserve method is used)	18,000
16	Rents	76,455
17	Taxes (attach schedule)	6,250
18	Interest	516
19	Contributions (attach schedule—see instructions for limitation)	
20	Losses by fire, storm, shipwreck, other casualty, or theft (attach schedule)	
21	Amortization (attach schedule)	
22	Depreciation (Schedule G)	6,750
23	Depletion (attach schedule)	
24	Advertising	310
25	(a) Pension, profit-sharing, stock bonus, annuity plans (see instructions)	20,361
	(b) Other employee benefit plans (see instructions)	
26	Other deductions (attach schedule)	261,285
27	TOTAL deductions in lines 12 through 26	494,863
28	Taxable income before net operating loss deduction and special deductions (line 11 less line 27)	(31,810)
29	Less: (a) Net operating loss deduction (see instructions—attach schedule)	
	(b) Special deductions (Schedule I)	
30	Taxable income (line 28 less line 29)	-0-

TAX

31	TOTAL income tax (Schedule J)		-0-
32	Credits: (a) Tax paid with Form 7004 application for extension (attach copy)	6,506 PAID	
	(b) Payments and credits on 1966 declaration of estimated tax		
	(c) Credit from regulated investment companies (attach Form 2439)		
	(d) Credit for U.S. tax on nonhighway gas. and lub. oil (attach Form 4136)		6,506
33	If tax (line 31) is larger than credits (line 32), the balance is TAX DUE. Enter balance here →		
34	If tax (line 31) is less than credits (line 32). Enter the OVERPAYMENT here →		6,506
35	Enter amount of line 34 you want: Credited on 1967 estimated tax _____ Refunded _____		

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete. If prepared by a person other than taxpayer, his declaration is based on all information of which he has any knowledge.

CORPORATE SEAL

Date _____ Signature of officer _____ Title _____

Date _____ Preparer's signature _____ Address _____

COPY

Exhibit A, Annexed to Affidavit of Barry I. Fredericks

SELECT MERCHANDISING
(U.S. CORPORATE TAX (LEDGER
1967

COST OF GOODS SOLD				
BEGINNING INVENTORY				106778
PURCHASES				1016715
SALARIES				155294
				1278787
LESS ENDING INVENTORY				124879
COST OF GOODS SOLD				1153908
PAYROLL				8053
MAIL EXPRESS				11397
OFFICE				57008
				76455
OTHER DEDUCTIONS				
TRAVEL + ENTERTAINMENT				20036
FREIGHT + CARTAGE				28613
RAILWAY + AUTO				20475
INSURANCE				9176
TELEPHONE				4810
LEGAL + AUDIT				2825
POSTAGE + PARCEL				5089
OFFICE EXPENSE				5167
BLDG EXP + MAINT				7685
HOSP + ENT				3527
ASSOC DUES				363
UNION DUES				834
GENERAL EXP				5319
WELFARE + PENSION FUND				4495
LOSS BY FIRE				20076
COMMISSIONS ELLIOTT LIROFF				55491
COMMISSIONS MARTIN WINDELL				55441
PERMITS				38
ELEC. + WATER				3337
				361783

Best Copy Available

Exhibit A, Annexed to Affidavit of Barry I. Fredericks

Schedule E—COMPENSATION OF OFFICERS (See instruction 12)

1. Name, address, and social security number of officer	2. Title	3. Time devoted to business	Percent of corporation stock owned 4. Common	5. Preferred	6. Amount of compensation	7. Expense account allowances
[illegible]	Pres.	Dir.			26500.00	
[illegible]	Asst. Treas.	Dir.			26500.00	
[illegible]	Sec'y. Treas.	Dir.			26500.00	
[illegible]	Vice Pres.	Dir.			26650.00	
Total compensation of officers—Enter here and on line 12, page 1					106150.00	

Schedule F—BAD DEBTS—RESERVE METHOD (See instruction 15)

1. Year	2. Trade notes and accounts receivable outstanding at end of year	3. Sales on account	Amount added to reserve 4. Current year's provision	5. Recoveries	6. Amount charged against reserve	7. Reserve for bad debts at end of year
1952						
1953						
1954						
1955						
1956						
1957						

Schedule G—DEPRECIATION (See instructions for Schedule G)

Taxpayers using Revenue Procedures 62-21 and 65-13: Make no entry in column 7, enter the cost or other basis of assets held at end of year in column 3, and enter the accumulated depreciation at end of year in column 4.

1. Class and Depreciable Asset Guideline Period of Property	2. Date acquired	3. Cost or other basis	4. Depreciation allowed or allowable in prior years	5. Method of computing depreciation	6. Life or rate	7. Depreciation for this year
1 Total additional first-year depreciation (do not include in items below)						
Buildings	8/1/59	7221.03	226.38	S.L.	10%	62.00
Furniture and fixtures						
Transportation equipment	6/30/60	6129.89	3585.97	S.L.	10%	552.00
Machinery and other equipment						
Other (specify)						
Leasehold Improvements	10/59	6754.00	2451.95	S.L.	5%	338.30
Copying Machine	2/10/55	1010.00	334.20	S.L.	33 1/3%	333.30
Vending Machine	12/60	400.00		S.L.	12 1/2%	50.00
2 Totals						6759.53
3 Less amount of depreciation claimed in Schedule A and elsewhere on return						6759.53
4 Balance—Enter here and on line 22, page 1						0

Schedule H—SUMMARY OF DEPRECIATION

	Straight line	Declining balance	Sum of the years-digits	Units of production	Additional first-year (section 179)	Other (specify)	Total
1 Under Rev. Procs. 62-21 and 65-13							
2 Other							

Exhibit A, Annexed to Affidavit of Barry I. Fredericks

H Date incorporated October 26, 19[illegible]

I (1) Did the corporation at the end of the taxable year own directly or indirectly 50 percent or more of the voting stock of a domestic corporation? . . . . . Yes ☐ No ☐

(2) Did any corporation, individual, partnership, trust, or association at the end of the taxable year own directly or indirectly 50 percent or more of the corporation's voting stock? . . . . . Yes ☐ No ☐
(For rules of attribution, see section 267(c).)

If the answer to (1) or (2) is "Yes," attach a schedule showing:

(a) name, address, and identifying number; and

(b) percentage owned.

If the answer to (1) above is "Yes," include the taxable income (or loss) from line 30, page 1, Form 1120 of such corporation for the taxable year ending with or within your taxable year.

J Did you have any contracts or subcontracts subject to the Renegotiation Act of 1951? . . . . . Yes ☐ No ☐
If "Yes," enter the aggregate gross dollar amount billed during the year

K Amount of taxable income (or loss) from line 30, page 1, Form 1120 for: 1964 7[illegible]2.19 1965 13[illegible]3.59 1966 23[illegible]5.36

L Did you claim a deduction for expenses connected with:

(1) A hunting lodge ☐, working ranch or farm ☐, fishing camp ☐, resort property ☐, pleasure boat or yacht ☐, or other similar facility ☐? (Other than where the operation of the facility was the principal business.) Yes ☐ No ☐

(2) The leasing, renting, or ownership of a hotel room or suite ☐, apartment ☐, or other dwelling ☐, which was used by customers or employees or members of their families? (Other than use by employees while in business travel status.) Yes ☐ No ☐

(3) The attendance of your employees' families at conventions or business meetings? Yes ☐ No ☐

(4) Vacations for employees or members of their fami
(Other than amount reported on Form W-2.) Yes ☐ No

M Refer to page 7 of instructions and state the:

Principal business activity Printing Supplies

Principal product or service

N Were you a member of a controlled group subject to the p
visions of section 1561 Yes ☐ No ☐, or section 15
Yes ☐ No ☐
If "Yes," check type of relationship:
(1) parent-subsidiary ☐
(2) brother-sister ☐
(3) combination of (1) and (2) ☐ (See section 1563)

O Were you liable for filing Forms 1096 and 1099 or 1087 for
calendar year 1967? . . . . . Yes ☐ No
If "Yes," where were they filed?

P Was there any substantial change in the manner of determin
quantities, costs, or valuations between opening and clos
inventory)? . . . . . Yes ☐ No
If "Yes," attach explanation.

Q Did you pay dividends during the taxable year which you consider
to be partially or wholly nontaxable to shareholders? Yes ☐ No
(See sections 301 and 316.) If this is a consolidated return, enc
here for parent corporation and on Form 851, "Affiliations Schedu
for each subsidiary.

R Were you a U.S. shareholder of any controlled foreign corpo
tion? Yes ☐ No ☒. (See sections 951 and 957.) If "Yes
attach Form 2848 for each such corporation.

Exhibit A, Annexed to Affidavit of Barry I. Fredericks

Form 1120 (1968) [Page 4]

Schedule L—BALANCE SHEETS	Beginning of taxable year (A) Amount	(B) Total	End of taxable year (C) Amount	(D) Total
ASSETS				
1 Cash		(5~~5)		5003
2 Trade notes and accounts receivable	105 635	105 635	125 43~	125 43~
(a) Less allowance for bad debts		106 776		120 579
3 Inventories				
4 Gov't obligations: (a) U.S. and instrumentalities				
(b) State, subdivisions thereof, etc.		131		
5 Other current assets (attach schedule)				
6 Loans to stockholders				
7 Mortgage and real estate loans				
8 Other investments (attach schedule)	99160		70 118	
9 Buildings and other fixed depreciable assets	36759	62361	43 0~6	~7 0~6
(a) Less accumulated depreciation				
10 Depletable assets				
(a) Less accumulated depletion		1~ 000		1~ 000
11 Land (net of any amortization)				
12 Intangible assets (amortizable only)				
(a) Less accumulated amortization		1~		1~
13 Other assets (attach schedule) Deposit		39~ 5~		40 5~~
14 Total assets				
LIABILITIES AND CAPITAL				
15 Accounts payable		55 ~35		79 3~5
16 Mtges., notes, bonds payable in less than 1 yr.		1~ 000		~0 ~~0
17 Other current liabilities (attach schedule) Taxes (A)		5 09~		3 54~
18 Loans from stockholders				
19 Mtges., notes, bonds payable in 1 yr. or more		9~ 000		9~ 4~~
20 Other liabilities (attach schedule)		57, 000		65 000
21 Capital stock: (a) Preferred stock	40 000	40 000	40 000	40 000
(b) Common stock				
22 Paid-in or capital surplus (attach reconciliation)				
23 Retained earnings—Appropriated (attach sch.)				
24 Retained earnings—Unappropriated		1~ 49~		95 9~~
25 Less cost of treasury stock		( )		( )
26 Total liabilities and capital		39~ 6~~		40~ 5~~

Schedule M-1—RECONCILIATION OF INCOME PER BOOKS WITH INCOME PER RETURN

1 Net income per books	(~055)	(37,043)	
2 Federal income tax	5~33		
3 Excess of capital losses over capital gains			
4 Taxable income not recorded on books this year (itemize)			
5 Expenses recorded on books this year not deducted on this return (itemize)			
(a) Depreciation $			
(b) Depletion $			
6 Total of lines 1 through 5	(5~ 5~0)		
7 Income recorded on books this year not included in this return (itemize)			
(a) Nontaxable interest $			
8 Deductions in this tax return not charged against book income this year (itemize)			
(a) Depreciation $			
(b) Depletion $			
9 Total of lines 7 and 8			
10 Income (line 28, page 1)—line 6 less 9		(31 C ~09	

Schedule M-2—ANALYSIS OF UNAPPROPRIATED RETAINED EARNINGS PER BOOKS (line 24, page 4)

1 Balance at beginning of year	1~9 49~	5 Distributions: (a) Cash	
2 Net income per books	(~055) (37 043)	(b) Stock	
3 Other increases (itemize) Collection of Taxes Rec. Acc	6, ~06	(c) Property Acc. Taxes Rec. Acc.	~ 62~
		6 Other decreases (itemize)	
4 Total of lines 1, 2, and 3		7 Total of lines 5 and 6	
		8 Balance at end of year (line 4 less 7)	95 9~~

Exhibit B, Annexed to Affidavit of Barry I. Fredericks—Amended Corporate Income Tax Return for 1968.

AMENDED

U.S. Corporation Income Tax Return

For calendar year 1968 or other taxable year beginning _____ 1968, ending _____ 19__
(PLEASE TYPE OR PRINT)

1968

Name: DELECT MERCHANDISING CORP

Number and street: 76 BLANCHARD ST.

City or town, State, and ZIP code: NEWARK N.J.

E Employer identification No.

F County in which located

G Enter total assets from line 15, column (d), Schedule L (See instruction N)

IMPORTANT—All applicable lines and schedules must be filed in. If the lines on the schedules are not sufficient, see instruction N.

GROSS INCOME

1	Gross receipts or gross sales _____ Less: Returns and allowances _____	1,741,058
2	Less: Cost of goods sold (Schedule A) and/or operations (attach schedule)	1,207,857
3	Gross profit	533,201
4	Dividends (Schedule C)	
5	Interest on obligations of the United States and U.S. instrumentalities	
6	Other interest	
7	Gross rents	
8	Gross royalties	
9	Net gains (losses)—(separate Schedule D)	
10	Other income (attach schedule)	
11	TOTAL income—Add lines 3 through 10	533,201

DEDUCTIONS

12	Compensation of officers (Schedule E)	115,560
13	Salaries and wages (not deducted elsewhere)	
14	Repairs (do not include capital expenditures)	
15	Bad debts (Schedule F if reserve method is used)	
16	Rents	18000
17	Taxes (attach schedule)	25559
18	Interest	4067
19	Contributions (attach schedule—see instructions for limitation)	363
20	Casualty or theft losses (attach schedule)	
21	Amortization (attach schedule)	
22	Depreciation (Schedule G)	6063
23	Depletion	
24	Advertising	799
25	(a) Pension, profit sharing, stock bonus, annuity plans (attach Form 2950)	25369
	(b) Other employee benefit plans (see instructions)	
26	Other deductions (attach schedule)	45,171
27	TOTAL deductions on lines 12 through 26	410900
28	Taxable income before net operating loss deduction and special deductions (line 11 less line 27)	122,301
29	Less: (a) Net operating loss deduction (see instructions—attach schedule)	
	(b) Special deductions (Schedule I)	
30	Taxable income (line 28 less line 29)	122,301

31	TOTAL TAX (Schedule J)		51,374
32	Credits: (a) Tax deposited—Form 7004 application for extension (attach copy). TAX on ORIGINAL RETURN	15,306	
	(b) 1968 estimated tax payments (include 1967 overpayment allowed as a credit—do not include any "quick refund" of overpayment of 1968 estimated tax applied for on Form 4466)		
	(c) Credit from regulated investment companies (attach Form 2439)		
	(d) Credit for U.S. tax on lubricating oil and fuel oil (attach Form 4136)		15306
33	TAX DUE (line 31 less line 32). See instruction G for tax deposit system		36068
34	OVERPAYMENT (line 32 less line 31)		
35	Enter amount of line 34 you want: Credited to 1969 estimated tax	Refunded	

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete. If prepared by a person other than the taxpayer, his declaration is based on all information of which he has any knowledge.

COPY

Exhibit B, Annexed to Affidavit of Barry I. Fredericks

Schedule A—COST OF GOODS SOLD (See instruction 2)

1 Inventory at beginning of year	[illegible]
2 Merchandise bought for manufacture or sale	[illegible]
3 Salaries and wages	[illegible]
4 Other costs (attach schedule)	[illegible]
5 Total	[illegible]
6 Less inventory at end of year	[illegible]
7 Cost of goods sold—Enter on line 2, page 1	[illegible]

Method of inventory valuation C or M

Was there any substantial change in the manner of determining quantities, costs, or valuations between opening and closing inventory? Yes ☐ No ☒ If "Yes," attach explanation.

Schedule C—DIVIDENDS (See instruction 4)

1 Domestic corporations subject to 85% deduction	
2 Certain preferred stock of public utilities	
3 Foreign corporations subject to 85% deduction	
4 Dividends from wholly-owned foreign subsidiaries subject to 100% deduction (section 245(b))	
5 Other dividends from foreign corporations	
6 Income from controlled foreign corporations (attach Form 5646)	
7 Foreign dividend gross-up (section 78)	
8 Qualifying dividends from affiliated groups (section 243(b))	
9 Other	
10 Total—Enter here and on line 4, page 1	

Schedule E—COMPENSATION OF OFFICERS (See instruction 12)

1. Name of officer	2. Social security number	3. Title	4. Time devoted to business	Percent of corporation stock owned: 5. Common	6. Preferred	7. Amount of compensation	8. Expense account allowances
[illegible]						[illegible]	

Total compensation of officers—Enter here and on line 12, page 1 [illegible]

Schedule F—BAD DEBTS—RESERVE METHOD (See instruction 15)

1. Year	2. Trade notes and accounts receivable at end of year	3. Sales account	Amount taken to reserve: 4. Current year's provision	5. Recoveries	6. Amount charged against reserve	7. Reserve for bad debts at end of year
1963						
1964						
1965						
1966						
1967						
1968						

Schedule G—DEPRECIATION (See instructions for Schedule G)

Taxpayers using Revenue Procedures 62-21 and 65-13: Make no entry in column 2, enter the cost or other basis of assets held at end of year in column 3, and enter the accumulated depreciation at end of year in column 4.

1. Description of property	2. Date acquired	3. Cost or other basis	4. Depreciation allowed or allowable in prior years	5. Method of computing depreciation	6. Life or rate	7. Depreciation for this year
1 Total additional first year depreciation (do not include in items below)						
Buildings	[illegible]	[illegible]	[illegible]	S L	[illegible]	[illegible]
Furniture and fixtures						
Transportation equipment	[illegible]	[illegible]	[illegible]	S L	[illegible]	[illegible]
Machinery and other equipment	[illegible]	[illegible]	[illegible]	S L	[illegible]	[illegible]
Other (specify)	[illegible]	[illegible]	[illegible]	S L	[illegible]	[illegible]
2 Totals		[illegible]				[illegible]
3 Less amount of depreciation claimed in Schedule A and elsewhere on return						[illegible]
4 Balance—Enter here and on line 22, page 1						[illegible]

Schedule H—SUMMARY OF DEPRECIATION

	Straight line	Declining balance	Sum of the years-digits	Units of production	Asset guideline period (section 167)	Other (specify)	Total
1 Items in Parts I and II of Schedule G	[illegible]						[illegible]
2 Other							

Exhibit B, Annexed to Affidavit of Barry I. Fredericks

12 Total tax—Add lines 9, 10, and 11. Enter here and on line 31, page 1 . . . . . 1156.37

Schedule K—RECORD OF FORM 503 FEDERAL TAX DEPOSITS (List deposits in order of date paid)

Serial number of Form 503	Date of deposit	Amount	Serial number of Form 503	Date of deposit	Amount	Serial number of Form 503	Date of deposit	Amount
278	7/31/68	500.00	13249					
283	12/31/68	500.00	26510					
220	3/12/69	156.37	32962					

H Date incorporated October 26 1954

I (1) Did you at the end of the taxable year own directly or indirectly 50% or more of the voting stock of a domestic corporation? . Yes ☐ No ☐

(2) Did any corporation, individual, partnership, trust, or association at the end of the taxable year own directly or indirectly 50% or more of your voting stock? . . . . . Yes ☐ No ☐

(For rules of attribution, see section 267(c).)

If the answer to (1) or (2) is "Yes," attach a schedule showing:
(a) name, address, and identifying number; and
(b) percentage owned.

If the answer to (1) above is "Yes," also show the taxable income (or loss) from line 30, page 1, Form 1120 of such corporation for the taxable year ending with or within your taxable year.

J Did you have any contracts or subcontracts subject to the Renegotiation Act of 1951? Yes ☐ No ☐. If "Yes," enter the aggregate gross dollar amount billed during the year. ▸ _____

K Did you claim a deduction for expenses connected with: Yes No

(1) Entertainment facility (boat, resort, ranch, etc.) . . ☐ ☒ 24(a)

(2) Living accommodations (except employees on business) . . . . . ☐ ☒ 24(a)

(3) Employees' families at conventions or meetings . . ☐ ☒ 24(a)

(4) Employee or family vacations not reported on Form W-2 . . . . . ☐ ☒ 24(a)

L Taxable income (or loss) from trade or business, Form 1120, for the 1965 _____ 1966 _____ 1967 _____

M Refer to page 7 of instructions and state the principal
Business activity ▸ Publishing & Distributing
Product or service ▸

N Were you a member of a controlled group subject to the provisions of
(1) Section 1561? . . . . . Yes ☐ No ☒
(2) Section 1552? . . . . . Yes ☐ No ☒

If answer to (1) or (2) is "Yes," check type of relationship:
(a) parent-subsidiary ☐
(b) brother-sister ☐
(c) combination of (a) and (b) ☐ (see section 1563)

If answer to (2) is "Yes," does section 1562(b)(1)(A) apply (nonapplication of 6% additional tax under section 1562)? . Yes ☐ No ☐

O Were you liable for filing Forms 1065 and 1099 or 1087 for the calendar year 1968? . . . . . Yes ☐ No ☐

If "Yes," where were they filed? _____

P Were you a U.S. shareholder of any controlled foreign corporation? Yes ☐ No ☐ (See sections 951 and 957.) If "Yes," attach Form 3646 for each such corporation.

Q Did you pay dividends (other than stock dividends and distributions in exchange for stock) during the taxable year which you considered to be partially or wholly nontaxable to shareholders? Yes ☐ No ☒ (See sections 301 and 316.) If this is a consolidated return, answer here for parent corporation and on Form 851, Affiliations Schedule, for each subsidiary.

R Did you ever declare a stock dividend? . . . . Yes ☐ No ☐

Exhibit B, Annexed to Affidavit of Barry I. Fredericks

Schedule J—Tax Computation

1 (a) 85% of line 1, Schedule C . . . . . .
(b) 85.102% of line 2, Schedule C (for taxable years ending after June 30, 1969, see instructions) . . . . . .
(c) 85% of line 3, Schedule C . . . . . .
(d) 100% of line 4, Schedule C . . . . . .
2 Total—(May not exceed 85% of line 28, page 1, less the sum of lines 3 and 5 of this schedule). The 85% limitation does not apply to a year in which a net operating loss occurs . . . . . .
3 100% of line 8, Schedule C . . . . . .
4 Dividends paid on certain preferred stock of public utilities (see instructions) . . . . . .
5 Western Hemisphere trade corporations (see instructions) . . . . . .
6 Total special deductions—Add lines 2 through 5. Enter here and on line 29(b), page 1 . . . . . .

Schedule J—TAX COMPUTATION (For taxable years ending after June 30, 1969, see page 6 of instructions)

1 Taxable income (line 30, page 1) 1 52 301
2 Surtax exemption (line 1, $25,000, or amount apportioned under section 1561, whichever is lesser) 2 25 000
3 Line 1 less line 2 . . . . . 3 27 301
4 (a) 22% of line 1 . . . . . 4a 5 406 5 948
(b) 26% of line 3 . . . . . 4b 46,704
(c) If multiple surtax exemption is elected under section 1562, enter 6% of line 2 . . . . . 4c
5 (a) Income tax (line 4, or line 24 of separate Schedule D, whichever is lesser) 5a 46,704 4670 51 374
(b) Tax Surcharge—10% of line 5(a) 5b
6 Foreign tax credit (attach Form 1118) 6 51 374
7 Line 5 less line 6 . . . . . 7 51 374
8 Investment credit (attach Form 3468) 8
9 Line 7 less line 6 . . . . . 9 51 374
10 (a) Personal holding company tax (attach Schedule 1120 PH) 10a
(b) Tax Surcharge—10% of line 10(a) 10b
11 Tax from recomputing a prior year investment credit (attach computation) 11
12 Total Tax—Add lines 9, 10, and 11. Enter here and on line 31, page 1 . . . . . 12 51374

Schedule K—RECORD OF FORM 503 FEDERAL TAX DEPOSITS (List deposits in order of date paid)

Serial number of Form 503	Date of deposit	Amount	Serial number of Form 503	Date of deposit	Amount	Serial number of Form 503	Date of deposit	Amount

H Date incorporated

I (1) Did you at the end of the taxable year own directly or indirectly 50% or more of the voting stock of a domestic corporation? Yes ☐ No ☐

(2) Did any corporation, individual, partnership, trust, or association at the end of the taxable year own directly or indirectly 50% or more of your voting stock? . . . . . Yes ☐ No ☐

(For rules of attribution, see section 267(c).)

If the answer to (1) or (2) is "Yes," attach a schedule showing:
(a) name, address, and identifying number; and
(b) percentage owned.

If the answer to (1) above is "Yes," also show the taxable income (or loss) from line 30, page 1, Form 1120 of such corporation for the taxable year ending with or within your taxable year.

J Did you have any contracts or subcontracts subject to the Renegotiation Act of 1951? Yes ☐ No ☐ If "Yes," enter the aggregate gross dollar amount billed during the year.

K Did you claim a deduction for expenses connected with: Yes No

(1) Entertainment facility (boat, resort, ranch, etc.) . . ☐ ☐
(2) Living accommodations (except employees on business) . . . . . ☐ ☐
(3) Employees' families at conventions or meetings . . ☐ ☐
(4) Employee or family vacations not reported on Form W-2 . . . . . ☐ ☐

L Taxable income (or loss) from line 30, page 1, Form 1120 for: 1968 . . . . . 1969 . . . . . 1967 . . . . .

M Refer to page 7 of instructions and state the principal:

Business activity

Product or service

N Were you a member of a controlled group subject to the provisions of:
(1) Section 1561? . . . . . Yes ☐ No ☐
(2) Section 1562? . . . . . Yes ☐ No ☐

If answer to (1) or (2) is "Yes," check type of relationship:
(a) parent-subsidiary ☐
(b) brother-sister ☐
(c) combination of (a) and (b) ☐ (see section 1563)

If answer to (2) is "Yes," does section 1562(b)(1)(A) apply (nonapplication of 6% additional tax under section 1562)? Yes ☐ No ☐

O Were you liable for filing Forms 1096 and 1099 or 1087 for the calendar year 1968? . . . . . Yes ☐ No ☐

If "Yes," where were they filed?

P Were you a U.S. shareholder of any controlled foreign corporation? Yes ☐ No ☐. (See sections 951 and 957.) If "Yes," attach Forms 5646 for each such corporation.

Q Did you pay dividends (other than stock dividends and distributions in exchange for stock) during the taxable year which you considered to be partially or wholly nontaxable to shareholders? Yes ☐ No ☐. (See sections 301 and 316.) If this is a consolidated return, answer here for parent corporation and on Form 851, Affiliations Schedule, for each subsidiary.

R Did you ever declare a stock dividend? . . . . Yes ☐ No ☐

Exhibit B, Annexed to Affidavit of Barry I. Fredericks

Taxpayer: Welsh Dredging Co. For the Year Ended 12/31/69

Name & Address _____ Social Security No. _____

Total Schedule C Taxes		
Payroll Taxes	9961.12	
Real Estate	11742.63	
State Franchise Taxes	1433.76	
City Business Taxes	1402.10	
Personal Tax	911.00	
Water	6261.50	
Misc.	1962.00	34,174.11
Schedule of Deductions		
Travel & Entertainment	11391.00	
Freight & Express	4931.00	
Advertising & Auto Expense	4899.75	
Depreciation & Rent	11401.31	
Insurance	6402.00	
Telephone	6745.52	
Legal & Accounting	6340.00	
Interest & Bank Fees	11033.71	
Office Expense & Supplies	4901.00	
Repairs	5700	
Construction Costs	4750	
Union Dues	4550	
Hospitalization Insurance	4916.50	
Pension Expense	4377.50	
Bonding & Expense & Interest	3331.61	
Welfare Fund & PCF	6702.50	112,961.00
COMMISSIONS E. LIROFF	3-676.	
COMMISSIONS M. WINDELL	3-676.	
		-1516.

Exhibit B, Annexed to Affidavit of Barry I. Fredericks

Schedule E—COMPENSATION OF OFFICERS (See instruction 12)

1. Name of officer	2. Social security number	3. Title	4. Time devoted to business	Percent of corporation stock owned: 5. Common	5. Preferred	7. Amount of compensation	8. Expense account allowances
[illegible]						[illegible].00	
[illegible]						26000.00	
[illegible]						[illegible].00	
[illegible]						27560.00	
Total compensation of officers—Enter here and on line 12, page 1						[illegible]560.00	

Schedule F—BAD DEBTS—RESERVE METHOD (See instruction 15)

Year	2. Trade notes and accounts receivable outstanding at end of year	3. Sales on account	Amount added to reserve: 4. Current year's provision	5. Recoveries	6. Amount charged against reserve	7. Reserve for bad debts at end of year
1963						
1964						
1965						
1966						
1967						
1968						

Schedule G—DEPRECIATION (See instructions for Schedule G)

Taxpayers using Revenue Procedures 62-21 and 65-13: Make no entry in column 2, enter the cost or other basis of assets held at end of year in column 3, and enter the accumulated depreciation at end of year in column 4.

1. Group and guideline class or description of property	2. Date acquired	3. Cost or other basis	4. Depreciation allowed or allowable in prior years	5. Method of computing depreciation	6. Life or rate	7. Depreciation for this year
Total additional first-year depreciation (do not include in items below)						
Buildings	1963 [illegible]	2140.00	1070.75	S L	15	214.00
Furniture and fixtures						
Transportation equipment	1965	6159.09	2758.96	S L	10%	551.82
Machinery and other equipment						
Other (specify)						
Leasehold Improvements	1959	6754.00	2797.35	S L	10%	382.00
12 Totals		21893.92				1147.82
13 Less amount of depreciation claimed in Schedule A and elsewhere on return						1147.82
14 Balance—Enter here and on line 22, page 1						

Schedule H—SUMMARY OF DEPRECIATION

	Straight line	Declining balance	Sum of the years-digits	Units of production	Additional first-year (section 179)	Other (specify)	Total
1 Under Rev. Procs. 62-21 and 65-13	1147.82						1147.82
2 Other							

Exhibit B, Annexed to Affidavit of Barry I. Fredericks

DELCET MERCHANDISING CORP
U.S. CORPORATE TAX RETURN
1963

Cost of Goods Sold					
	Beginning Inventory				124879
	Purchases				1010704
	Salaries				179940
					1315524
	Less Ending Inventory				107664
	Cost of Goods Sold				1207857
Other:					
	Payroll				
	Real Estate				
	Other				
Other Deductions					
	Travel & Entertainment				
	Freight & Express				
	Delivery & Auto Insurance				
	Telephone				
	Legal & Accg.				
	Postage & Parcel				
	Carpet Cleaning				
	Bldg Exp. & Maint.				

Exhibit B, Annexed to Affidavit of Barry I. Fredericks

Schedule A—Cost of Goods (See instructions 2)

1 Inventory at beginning of year	[illegible]
2 Merchandise bought for manufacture or sale	[illegible]
3 Salaries and wages	[illegible]
4 Other costs (attach schedule)	[illegible]
5 Total	[illegible]
6 Less inventory at end of year	[illegible]
7 Cost of goods sold—Enter on line 2, page 1	[illegible]

Method of inventory valuation C OR M

Was there any substantial change in the manner of determining quantities, costs, or valuations between opening and closing inventory? Yes ☐ No ☒. If "Yes," attach explanation.

Schedule C—Dividends (See instructions 4)

1 Domestic corporations subject to 85% deduction	
2 Certain preferred stock of public utilities	
3 Foreign corporations subject to 85% deduction	
4 Dividends from wholly owned foreign subsidiaries subject to 100% deduction (section 245(b))	
5 Other dividends from foreign corporations	
6 Income from controlled foreign corporations (attach Form 3646)	
7 Foreign dividend gross-up (section 78)	
8 Qualifying dividends from affiliated groups (section 243(b))	
9 Other	
10 Total—Enter here and on line 4, page 1	

Schedule E—COMPENSATION OF OFFICERS (See instruction 12)

1. Name of officer	2. Social security number	3. Title	4. Time devoted to business	5. Percent of corporation stock owned: a. Common	b. Preferred	6. Amount of compensation	7. Expense account allowances
[illegible]						[illegible]	
[illegible]						[illegible]	
[illegible]						[illegible]	
[illegible]						[illegible]	
[illegible]							
Total compensation of officers—Enter here and on line 12, page 1						[illegible]	

Schedule F—BAD DEBTS—RESERVE METHOD (See instruction 15)

1. Year	2. Trade notes and accounts receivable outstanding at end of year	3. Sales on account	4. Current year's provision	5. Recoveries	6. Amounts charging off against reserve	7. Reserve for bad debts at end of year
1963						
1964						
1965						
1966						
1967						
1968						

Schedule G—DEPRECIATION (See instructions for Schedule G)

Taxpayers using Revenue Procedures 62-21 and 65-13, make no entry in column 2, enter the cost or other basis of assets held at end of year in column 3, and enter the accumulated depreciation at end of year in column 4.

1. Group and subclass code or enter kind of property	2. Date acquired	3. Cost or other basis	4. Depreciation allowed or allowable in prior years	5. Method of computing depreciation	6. Life or rate	7. Depreciation for this year
1 Total additional first year depreciation (do not include in items below)						
Buildings	1960-65	2240.00	1040.00	S L	10%	240.00
Furniture and fixtures						
Transportation equipment						
Machinery and other equipment	1960	61200.00	39200.00	S L	10%	5500.00
Other (specify)						
Leasehold Improvements	1957	6700.00	2700.15	S L	10%	399.85
2 Totals		70140.00				6139.85
3 Less amount of depreciation claimed in Schedule A and elsewhere on return						6139.85
4 Balance—Enter here and on line 22, page 1						

Schedule H—SUMMARY OF DEPRECIATION

	Description	Business balance	Sum of the years digits	Units of production	Additional first year (section 179)	Other (specify)	Total
1 Write-Ins Prior 1962 and after							6139.70
2 Other	6139.70						

Exhibit B, Annexed to Affidavit of Barry I. Fredericks

Form 1120 (1969) — Schedule L—BALANCE SHEETS — [illegible]

ASSETS	Beginning of taxable year (A) Amount	(B) Total	End of taxable year (C) Amount	(D) Total
1 Cash		5003		3763
2 Trade notes and accounts receivable	178437		185461	
(a) Less allowance for bad debts		178437		185461
3 Inventories		134579		107664
4 Gov't obligations: (1) U.S. and instrumentalities				
(b) State, subdivisions thereof, etc.	SUCCESSIVE YEARS			
5 Other current assets (attach schedule)				40000
6 Loans to stockholders				20000
7 Mortgage and real estate loans				
8 Other investments (attach schedule)				
9 Buildings and other fixed depreciable assets	70114		70114	
(a) Less accumulated depreciation	43028	27086	49091	21023
10 Depletable assets				
(a) Less accumulated depletion				
11 Land (net of any amortization)		120000		165000
12 Intangible assets (amortizable only)				
(a) Less accumulated amortization				
13 Other assets (attach schedule)		125		336
14 Total assets		425503		543747
LIABILITIES AND STOCKHOLDERS' EQUITY				
15 Accounts payable		79345		113449
16 Mtges., notes, bonds payable in less than 1 yr.		25240		
17 Other current liabilities (attach schedule)		3544		11623
18 Loans from stockholders				
19 Mtges., notes, bonds payable in 1 yr. or more		93424		94454
20 Other liabilities (attach schedule)		54000		70478
21 Capital stock: (a) Preferred stock	40000	40000	80000	80000
(b) Common stock				
22 Paid-in or capital surplus (attach reconciliation)				
23 Retained earnings—Appropriated (attach sch.)				
24 Retained earnings—Unappropriated		95977		173703
25 Less cost of treasury stock		( )		( )
26 Total liabilities and stockholders' equity		425503		543747

Schedule M-1—RECONCILIATION OF INCOME PER BOOKS WITH INCOME PER RETURN

1 Net income per books	117391	7 Income recorded on books this year not included in this return (itemize)	
2 Federal income tax	9910	(a) Tax-exempt interest $	
3 Excess of capital losses over capital gains			
4 Taxable income not recorded on books this year (itemize)		8 Deductions in this tax return not charged against book income this year (itemize)	
		(a) Depreciation $	
5 Expenses recorded on books this year not deducted in this return (itemize)		(b) Depletion $	
(a) Depreciation $			
(b) Depletion $			
6 Total of lines 1 through 5	127301	9 Total of lines 7 and 8	
		10 Income (line 28, page 1)—line 6 less 9	127301

Schedule M-2—ANALYSIS OF UNAPPROPRIATED RETAINED EARNINGS PER BOOKS (Line 24 above)

1 Balance at beginning of year	95977	5 Distributions: (a) Cash	
2 Net income per books	117391	(b) Stock	
3 Other increases (itemize)		(c) Property	
		6 Other decreases (itemize) Add. P.C.S.	35,155
4 Total of lines 1, 2, and 3		7 Total of lines 5 and 6	
		8 Balance at end of year (line 4 less 7)	173703

Exhibit C, Annexed to Affidavit of Barry I. Fredericks—Notice of Deficiency, Dated December 14, 1979.

Internal Revenue Service
Regional Commissioner

Department of the Treasury

Dated: DEC 14 1979
Deleet Merchandising Corp.
20 Blanchard Street
Newark, New Jersey 07102

Person to Contact:
Philip J. Glackin
Contact Telephone Number:
201-643-6200

	Deficiency	
	Tax	*Addition to Tax Section 6653(b) IRC*
December 31, 1966	$ 35,934.54	$19,586.84
December 31, 1967	23,243.00	13,856.00
December 31, 1968	36,316.01	39,275.82
December 31, 1969	100,218.50	92,371.75
December 31, 1970	126,235.41	60,117.71
December 31, 1971	33,195.58	57,215.16
December 31, 1972	7,544.48	-0-

Gentlemen:

We have determined that there is deficiency (increase) in your income tax as shown above. This letter is a NOTICE OF DEFICIENCY sent to you as required by law. The enclosed statement shows how we figured the deficiency.

If you want to contest this determination in court before making any payment, you have 90 days from the above mailing date of this letter (150 days if addressed to you outside of the United States) to file a petition with the United States Tax Court for a redetermination of the amount of your tax. The petition should be filed with the

Exhibit C, Annexed to Affidavit of Barry I. Fredericks

United States Tax Court. 400 Second Street NW., Washington, DC 20217, and the copy of this letter should be attached to the petition. The time in which you must file a petition with the Court (90 or 150 days as the case may be) is fixed by law and *the Court cannot consider your case if your petition is filed late.* If this letter is addressed to both a husband and wife, and both want to petition the Tax Court, *both* must sign the petition or each must file a separate, signed petition. You can get a copy of the rules for filing a petition by writing to the Clerk of the United States Tax Court, at the address shown in this paragraph.

If you decide not to file a petition with the Tax Court, we would appreciate it if you would sign and return the enclosed waiver form. This will permit us to charge your account quickly and will limit the accumulation of interest. The enclosed addressed envelope is for your convenience. If you decide not to sign and return the waiver and you do not timely petition the Tax Court, the law requires us to bill you after 90 days from the above mailing date of this letter (150 days if this letter is addressed to you outside the United States).

If you have any questions, please contact the person whose name and telephone number are shown above.

Sincerely yours,

JEROME HURTZ
Commissioner
By (Signed) L. DICKSTEIN
(Illegible) Appeals Office

Enclosures:
Copy of this letter
Statement
Waiver
Envelope

Memorandum of the District Court.

UNITED STATES DISTRICT COURT
Room 411, U.S. Post Office Building
Newark, New Jersey 07102
FTS #(0) 341-2517

Vincent P. Biunno (201) 645-2417
Judge (201) 642-2451

[Filed December 21, 1981]

MEMORANDUM

Re: Deleet Mfg. Co. v. United States,
Civ. 80-26

Plaintiff has filed a motion for summary judgment returnable December 13, 1981. The motion is accompanied by a brief arguing the point that deficiency assessments dated December 14, 1979, in respect to taxes for 1967 and 1968 are barred by the statute of limitations.

The brief commendably lists a series of seven facts as to which it is claimed there is no geniune issue. In reviewing them, however, the court raises a number of questions now so that the parties can be prepared to address them at argument, or before.

1. Fact 1 says that the original 1967 return showed a tax due of $5,233.05, while Fact 3 says that after the amended return was filed for 1967, there was a request for refund of $6,206. *Query*: can a refund claim exceed the tax paid?

2. Fact 1 says the original 1968 return showed tax due of $36,608., which was paid. Fact 3 says that the amended 1968 return showed $36,314.01 due for 1968 and that it was also paid. Fact 5 says that a claim for refund for 1968

was disallowed. *Query*: are all these facts correct? Where is there mention of the 1968 *refund*?

3. Fact 5 says that the December 14, 1979 notice assessed deficiencies of taxes for both 1967 and 1968, and penalties as well. Fact 6 says that the assessments were paid on December 27, 1979. Fact 7 says that suit here was begun January 8, 1980. *Query*: can the present suit seek repayment of the amounts paid December 27, 1979 without first filing a refund claim or claims? See I.R.C. §7422(a) and (c), and Reg. §301.6532-1(a).

4. Are any of the provisions of 26 USC §§1311 *et seq.* applicable to toll any otherwise applicable statute of limitations? These are the present 1954 Code counterparts of the former §3801 of the 1939 Code.

November 30, 1981

s/ VINCENT P. BIUNNO,
U.S.D.J.

Original to Clerk
xc: Fredericks & Messinger, Esqs.
Anne Singer, AUSA

Affidavit of Edward Sussman.

State of New York,
County of New York, ss:

EDWARD SUSSMAN, being duly sworn, deposes and says:

1. I am a member of Goldschmidt, Fredericks & Oshatz, attorneys for the plaintiff Deleet Merchandising Corporation. Except as hereinafter stated, I am personally familiar with the facts and circumstances set forth and I make this affidavit in reply to the opposition memorandum of the government and in further support of plaintiff's application for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

2. Initially I would point out to the Court that both the original moving papers and the government's opposition contain certain misstatements of fact. These inaccuracies deal with the content of the original and amended tax returns filed by the plaintiff. In order that such mistakes be corrected there is set forth below all of the pertinent information relating thereto:

Year	*Total Tax Due on Original Return*	*Total Tax Due on Amended Return*	*Deficiency Alleged By Government*
1967	$ 6,206.49	Refund Requested	$38,604.00
1968	$11,063.83	$51,374.00	$75,589.83

3. The deficiencies assessed were paid by plaintiff and it is these amounts which are the subject of the suit. There is

no dispute that plaintiff's original returns were timely filed nor is there any dispute that plaintiff's amended returns were filed in August, 1973. Finally, there is no issue that the government did not make any assessment until December 14, 1979, more than six years subsequent to the filing of plaintiff's amended return. Having unduly delayed its own administrative determination for a prolonged period and thereby having been caught short by the decisions of both the Tenth Circuit Court of Appeals and The Tax Court, the government now asserts that this Court should deny judgment to plaintiff by arguing two totally inconsistent positions. On the one hand, the government contends that because plaintiff did not specifically assert the limitation period in its claim for refund this Court may not consider it. On the other hand, the government argues that on the merits, it adheres to the position it argued in the cases decided adversely to it. Differently stated, the government's position is that it would deny a refund claim based on the expiration of the limitation period but absent such a formality, this Court should not rule on the legal issue presented. Stripped of excess verbiage, the government's position is that plaintiff must undertake a totally futile gesture for no logical reason.

4. Annexed hereto as Exhibits A and B are copies of amended claims for refund which plaintiff has caused to be forwarded to the Internal Revenue Service. As may be seen, these claims specifically allege the passage of the limitations period as a basis for refund. It is anticipated that in response to this development, the government will contend that it is entitled to delay action for a period of six months under Internal Revenue Code section §7422(a). Again no logical reason supports the government's position.

5. Accompanying this affidavit is plaintiff's reply memorandum of law. As may be seen therefrom, the government's reliance on the failure of plaintiff to specifically allege in its claim for refund the statutory limitation of §6501(a) of the Internal Revenue Code is misplaced. The underlying purpose of this administrative rule is to enable the government to analyze the taxpayer's basis for refund and to limit the issues to be litigated. In the instant case, there is absolutely no doubt that the government must reject plaintiff's limitation claim.

6. Moreover, it is not at all clear that the administrative regulation relied upon by the government has any application to the case at bar. The insant lawsuit was instituted on or about January 8, 1980, prior to the decision by the Tenth Circuit Court of Appeals in *Dowell v. Commissioner*, 614 F.2d 1263. Subsequently, the Tax Court adopted the rationale of the Tenth Circuit. Clearly, the government was at all times aware of the implications of these decisions on the case at bar. Thus, there cannot be any element of surprise or unfairness with respect to the instant motion.

WHEREFORE, deponent respectfully requests that this Court grant plaintiff's application in all respects.

(Sworn to by Edward Sussman, December 9, 1981.)

Order for Summary Judgment.

Plaintiff having moved the Court for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and said motion having regularly come on to be heard at on the 14th day of December, 1981, and the Court having found that plaintiff is entitled to judgment as a matter of law, it is

ORDERED that plaintiff's motion is in all respects granted and it is further

ORDERED that the Clerk enter judgment in favor of plaintiff and against defendant in the sum of One Hundred Fourteen Thousand One Hundred Ninety-Three Dollars and Eighty-Three Cents ($114, 193.83) together with interest and costs as provided by law.

12/22/81

(Illegible)
U.S.D.J.

Original Filed
Dec 22 1981
Angelo W. Locascio, Clerk

Notice of Appeal.

Notice is hereby given that the United States of America, the defendant above named, hereby appeals to the United States Court of Appeals for the Third Circuit from the final judgment entered in this action on the 22nd day of December, 1981.

W. HUNT DUMONT
United States Attorney

By: ANNE C. SINGER
Assistant United States Attorney

Filed
Feb 18 1982
4:45 PM
Angelo W. Locascio

Office-Supreme Court, U.S.
FILED
APR 18 1983
ALEXANDER L. STEVAS,
CLERK

Nos. 82-1453 and 82-1509

In the Supreme Court of the United States

OCTOBER TERM, 1982

ERNEST BADARACCO SR., ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

DELEET MERCHANDISING CORP., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS

REX E. LEE
Solicitor General

GLENN L. ARCHER
Assistant Attorney General

STUART A. SMITH
Assistant to the Solicitor General

GARY R. ALLEN
JOHN A. DUDECK, JR.
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Section 6501(a) of the Internal Revenue Code of 1954 (26 U.S.C.) provides that "the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed * * *." Section 6501(c)(1) sets forth an exception for false or fraudulent returns, providing that in such cases, "the tax may be assessed * * * at any time."

The question presented is whether the statutory exception prescribing that no period of limitations is applicable to fraudulent returns requires that where a fraudulent return is filed in the first instance, the subsequent filing of an amended nonfraudulent return does not commence the running of the three-year statute of limitations.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1453

ERNEST BADARACCO SR., ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

No. 82-1509

DELEET MERCHANDISING CORP., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The consolidated opinion of the court of appeals (82-1453 Pet. App. 4a-20a; 82-1509 Pet. App. 1a-17a) is reported at 693 F.2d 298. The opinion of the Tax Court in No. 82-1453 (Pet. App. 21a-27a) is not reported. The opinion of the district court in No. 82-1509 (Pet. App. 1d-5d) is reported at 535 F. Supp. 402.

JURISDICTION

The judgment of the court of appeals (82-1453 Pet. App. 2a-3a; 82-1509 Pet. App. 1b-2b) was entered on November 29, 1982. Petitions for rehearing (82-1453 Pet. App. 1a; 82-1509 Pet. App. 1c-2c) were denied on December 20 and December 23, 1982. The petitions for a writ of certiorari were filed on February 24, 1983 (No. 82-1453) and March 8, 1983 (No. 82-1509), respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1.a. *No. 82-1453.* Petitioners Ernest Badaracco, Sr., and Ernest Badaracco, Jr.,[1] were partners in an electrical contracting business. For each of the years 1965 through 1969, they filed individual and partnership returns that fraudulently understated their partnership income. On August 17, 1971, after federal grand juries had subpoenaed the partnership's books and records, petitioners filed nonfraudulent amended returns for the years in question. Petitioners were thereafter indicted on 15 counts for filing false and fraudulent income and partnership tax returns in violation of 26 U.S.C. 7206(1). They each entered a plea of guilty to the charge of filing a false and fraudulent partnership return for 1967, and the district court entered a judgment of conviction on June 6, 1973.[2] *United States* v. *Badaracco*, No. 766-71 (N.J. Crim.) (82-1453 Pet. App. 6a-7a, 23a-24a).

On November 21, 1977, the Commissioner of Internal Revenue issued notices of deficiency for the years in question, asserting liability for additions to tax under Section

---

[1]Their wives, Rose Badaracco and Barbara Badaracco, are parties to this action only because they filed joint federal income tax returns for the years in issue with their respective husbands.

[2]The remaining counts of the indictment were dismissed.

6653(b) of the Internal Revenue Code of 1954 (26 U.S.C.), on account of fraud. In these proceedings brought in the Tax Court for a redetermination of the deficiencies, petitioners stipulated that the underpayments of tax on their original income tax returns were due to fraud. They contended, however, that assessments of the deficiencies was nevertheless barred by the statute of limitations under Section 6501(a) of the 1954 Code because the deficiency notices were not issued within three years after the filing of their amended returns. The Tax Court, following its decision in *Klemp* v. *Commissioner*, 77 T.C. 201 (1981), appeal pending, No. 81-7744 (9th Cir.), and the Tenth Circuit's decision in *Dowell* v. *Commissioner*, 614 F.2d 1263 (1980), upheld petitioner's position that the assessments were time barred (82-1453 Pet. App. 7a, 24a-27a).

b. *No. 82-1509.* Petitioner Deleet Merchandising Corp. filed timely corporate income tax returns for 1967 and 1968, but failed to report certain receipts for those years. It thereafter filed amended returns disclosing the unreported receipts on August 9, 1973. Following lengthy criminal and civil investigations, the Commissioner issued a notice of deficiency to Deleet on December 14, 1979, asserting deficiencies in tax and additions to tax for fraud under Section 6653(b) for both years. After paying the disputed amounts, Deleet brought this refund suit in the United States District Court for the District of New Jersey. In its motion for summary judgment, Deleet asserted that, even if the original returns had been fraudulent, the deficiencies and penalties could not be assessed more than three years after the filing of the amended returns. The district court, likewise relying on *Dowell* v. *Commissioner*, *supra*, and *Klemp* v. *Commissioner*, *supra*, granted summary judgment in favor of Deleet (82-1509 Pet. App. 1d-5d).

2. The court of appeals reversed in both cases, with one judge dissenting (82-1453 Pet. App. 4a-20a; 82-1509 Pet. App. 1a-17a). The court concluded that the terms of Section 6501(c)(1) permit the Commissioner "[i]n the case of a false or fraudulent return with the intent to evade tax" to assess the tax or proceed in court without an assessment "at any time." In the court's view, nothing on the face of the statute, its legislative history, or the regulations indicates that taxpayers who had filed fraudulent returns could thereafter claim the benefit of the general three-year statute of limitations by filing nonfraudulent amended returns. The court also noted that the three-year period was inadequate to permit the Commissioner to meet his dual responsibility of proceeding in fraud cases both criminally and civilly (82-1453 Pet. App. 12a-13a; 82-1509 Pet. App. 9a-10a).

DISCUSSION

The court of appeals correctly held that the filing of a nonfraudulent amended return does not start the running of the ordinary three-year statute of limitations under Section 6501(a) of the 1954 Code where a fraudulent return for the year in question was filed in the first instance.

1. Section 6501(a) of the Internal Revenue Code of 1954 (26 U.S.C.) provides that "[e]xcept as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) * * *." Among the exceptions to that general rule is that set forth in Section 6501(c)(1), which provides that "[i]n the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed * * * at any time."

It has long been recognized that statutes of limitations with respect to the assessment and collection of taxes are to be narrowly construed. See, *e.g.*, *Bowers* v. *New York &*

Albany Lighterage Co., 273 U.S. 346, 349 (1927); *Lucia* v. *United States*, 474 F.2d 565, 570 (5th Cir. 1973); *McDonald* v. *United States*, 315 F.2d 796, 801 (6th Cir. 1963). Thus, a statute of limitations will not be presumed to apply in the absence of clear congressional direction, and may not be extended beyond its clear language. *McDonald* v. *United States*, *supra*. Moreover, it is a basic principle of statutory construction that a specific statute controls over a general provision. *Bulova Watch Co.* v. *United States*, 365 U.S. 753, 761 (1961).

The exception to the general three-year period of limitations provided by Section 6501(c)(1) applies "[i]n the case of a false or fraudulent return with the intent to evade tax." It is unqualified on its face. Petitioners in *Badaracco* admittedly filed such false and fraudulent returns for the years there in question. Likewise, petitioner in *Deleet* was required to assume, for purposes of its motion for summary judgment, that its original returns for 1967 and 1968 were fraudulent. These cases remained "case[s] of a false or fraudulent return" notwithstanding the subsequent filing of nonfraudulent amended returns. See *George M. Still, Inc.* v. *Commissioner*, 19 T.C. 1072 (1953), aff'd, 218 F.2d 639 (2d Cir. 1955); *Plunkett* v. *Commissioner*, 465 F.2d 299, 303 (7th Cir. 1972). Nothing in the statute or its legislative history supports petitioners' contentions that the filing of a nonfraudulent amended return after the filing of a fraudulent original return starts the normal three-year period of limitations in Section 6501(a). Rather, it is clear under Section 6501(c)(1) that "if a return be fraudulent in any respect with intent to evade a tax, it deprives the taxpayer of the bar of the statute for that year." *Lowy* v. *Commissioner*, 288 F.2d 517, 520 (2d Cir. 1961), cert. denied, 368 U.S. 984 (1962).

Indeed, not only is there no reference in the language of Section 6501(a) or (c)(1) to the subsequent filing of

amended returns, but there is no statutory authority anywhere in the Internal Revenue Code for the filing of such returns.[3] Thus, as this Court recently pointed out in *Hillsboro National Bank* v. *Commissioner*, No. 81-485 (Mar. 7, 1983), slip op. 8 n.10, "it is settled that the acceptance of * * * [an amended] return * * * after the date for filing a return is not covered by statute but within the discretion of the Commissioner." See, *e.g.*, *Koch* v. *Alexander*, 561 F.2d 1115, 1117 (4th Cir. 1977); *Miskovsky* v. *United States*, 414 F.2d 954, 955 (3d Cir. 1969)."[4]

Moreover, the courts have consistently held in other contexts that the filing of amended returns has no bearing on the operation of the statute of limitations. Thus, in *Zellerbach Paper Co.* v. *Helvering*, 293 U.S. 172, 180 (1934) and *National Paper Products Co.* v. *Helvering*, 293 U.S. 183 (1934), this Court held that the Commissioner could not rely on the filing of an amended or supplemental return as a basis for extending the statutory period for assessment and collection. Likewise, in *Goldring* v. *Commissioner*, 20 T.C. 79 (1953) and *Houston* v. *Commissioner*, 38 T.C. 486 (1962), the Tax Court held that, where

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[3]Section 6213(g)(1) of the 1954 Code defines the term "return," for the limited purpose of the summary assessment procedures applicable where an underpayment is based on "mathematical or clerical errors appearing on the return" (see Section 6213(b)), as including "any return, statement, schedule, or list, and any amendment or supplement thereto" (26 U.S.C. (Supp. V) 6213(g)(1)). But even the dissenting judge below acknowledged (82-1453 Pet. App. 16a-17a n.3; 82-1509 Pet. App. 13a-14a n.3) that this provision was adopted solely to insure that all supporting schedules on file be examined by the Commissioner before determining that there is an underpayment based on such a mathematical or clerical error. Hence, Section 6213(g)(1) has no bearing on the question presented by the petitions.

[4]It is undisputed that the amended returns in each of these cases were filed long after the expiration of the time for filing the original return. See 82-1453 Pet. App. 6a-7a; 82-1509 Pet. App. 4a.

the filing of a return with an understatement in gross income in excess of 25% activated the extended limitations period under the 1939 Code (26 U.S.C. (1940 ed.) 275(c)) predecessor of Section 6501(e) of the 1954 Code, later amended returns reducing the understatement below 25% could have no effect on the extended assessment period. Accord: *Foster* v. *Commissioner*, 45 B.T.A. 126 (1941), aff'd, 131 F.2d 405 (5th Cir. 1942). See also *Kaltreider Construction, Inc.* v. *United States*, 303 F.2d 366, 368 (3d Cir.), cert. denied, 371 U.S. 877 (1962); *National Refining Co.* v. *Commissioner*, 1 B.T.A. 236 (1924).

In sum, once petitioners filed fraudulent original returns, they plainly lost any benefit of the statute of limitations for the years in question. To conclude otherwise would ignore the plain language of the statute itself. Thus, the court of appeals correctly held that Section 6501(c)(1) continues to apply in these circumstances. Accord, *Nesmith* v. *Commissioner*, 699 F.2d 712 (5th Cir. 1983).

2. The court below acknowledged (82-1453 Pet. App. 8a-10a; 82-1509 Pet. App. 5a-7a) (as did the Fifth Circuit in *Nesmith, supra*) that its ruling conflicted with *Dowell* v. *Commissioner*, 614 F.2d 1263 (10th Cir. 1980), and the cases that have followed it (*e.g.*, *Britton* v. *United States*, 532 F. Supp. 275 (D. Vt. 1981), aff'd, 697 F.2d 288 (2d Cir. 1982) (table) and *Klemp* v. *Commissioner*, 77 T.C. 201 (1981), appeal pending, No. 81-7744 (9th Cir.). In *Dowell*, the court placed primary reliance on the Tax Court's decision in *Bennett* v. *Commissioner*, 30 T.C. 114 (1958), which involved the 1939 Code predecessor of Section 6501(c)(3), allowing assessment at any time in the case of a "failure to file a return." The Tax Court in *Bennett* held that the filing of a late *original* return started the running of the ordinary three-year period of limitations. As the Tax Court noted in its decision in *Dowell* v. *Commissioner*, 68 T.C. 646, 650-651 (1977), rev'd, 614 F.2d 1263 (10th Cir. 1980), *Bennett* is

inapposite. Once the delinquent returns were filed in *Bennett*, it was no longer strictly a case of a "failure to file a return," but only a case of a failure to file a *timely* return. Here, the original returns filed by petitioners were a "case of a false or fraudulent return." That conclusion stands despite the fact that they untimely disclosed the fraudulent omissions on later-filed amended returns.[5]

Moreover, while the late original returns in *Bennett* were unquestionably "the return[s]" for the years there in question, the amended returns filed in the instant cases cannot be considered as "the return[s]" for the years here in question within the meaning of Section 6501(a) (cf. *National Refining Co.* v. *Commissioner*, *supra*). Thus, they could not have any independent significance for the purposes of that provision even if the provisions of Section 6501(c)(1) were disregarded.[6]

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[5]Indeed, in revising these limitations provisions when the 1954 Code was adopted, Congress acted to remove any ambiguity that might be thought to inhere in the 1939 Code provisions (which were later before the Tax Court in *Bennett*) by specifically providing in Section 6501(a) that the three-year period, where applicable, begins to run on the date "the return was filed (whether or not such return was filed on or after the date prescribed) * * *." No similar provision was adopted with respect to the effect of filing amended returns after the filing of false or fraudulent original returns. Thus, as the court below concluded (82-1453 Pet. App. 10a n.6; 82-1509 Pet. App. 7a n.6), Congress did, in fact, provide a clear indication that it did not intend that the two situations would be entitled to precisely the same treatment under these provisions.

[6]The court in *Dowell* reasoned that the original fraudulent Forms 1040 filed in that case were not "returns" at all within the meaning of these provisions and that the amended returns were, therefore, the only "returns" filed by that taxpayer for the years in question. 614 F.2d at 1265. That analysis, however, is based on a misreading of this Court's opinion in *Zellerbach Paper Co.* v. *Helvering*, *supra*. After the taxpayer in *Zellerbach* had filed original returns for the periods there in question, certain changes were made in the applicable law, and a Treasury Regulation was adopted requiring the filing of amended or supplemental returns if additional taxes were owing as a result of the changes. Although the taxpayer failed to file such an amended return,

Moreover, the court below noted (82-1453 Pet. App. 12a-13a; 82-1509 Pet. App. 9a-10a), that there are, in fact, substantial reasons why Congress could conclude that the imposition of a three-year limitations period on assessment in such cases would be inadequate to allow the Commissioner to fulfill his obligation to enforce both the civil and criminal provisions of the Internal Revenue Code. In addition to other factors supporting the deferral of civil assessment pending the completion of related fraud investigations,[7] the Internal Revenue Service loses its entitlement to

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the additional liability in its case could have been computed on the basis of the information shown on its original returns. This Court concluded that, whether or not an amended return had been filed, the Commissioner remained subject to the ordinary assessment period running from the date the original return for each year was filed. In so ruling, the Court noted that "[p]erfect accuracy or completeness is not necessary to rescue a return from nullity, if it *purports* to be a return, is *sworn to* as such * * * and *evinces* an honest and genuine endeavor to satisfy the law" and that "the limitation shall run from the original return when there is nothing *on the face of that return* to indicate that the liability reported is less than owing." 293 U.S. at 180, 182 (emphasis added; footnote omitted).

Contrary to the Tenth Circuit's analysis, the *Zellerbach* decision does not support its conclusion that a return that *purports* to be a complete and accurate return, but which is nonetheless false or fraudulent, is a mere "nullity" for statute of limitations purposes. It could scarcely be doubted that such "returns" are precisely what Congress had in mind in enacting the provisions of Section 6501(c)(1). Presumably it used the term "the return" in Section 6501(a) with the same understanding. Indeed, if fraudulent Forms 1040 were not "returns" for these purposes, Section 6501(c)(1) would be not only superfluous, but also a contradiction of terms.

[7] It has long been the policy of the Internal Revenue Service to defer the assessment of civil liability, where possible, in such cases. See Policy Statement P-4-84, 1 Internal Revenue Manual—Administration (CCH) para. 1218, at 1303-78 (Dec. 1980). The wisdom of that policy, in light of the potential for interference in the orderly prosecution of criminal cases if civil suits could be simultaneously maintained by the taxpayer for the same period, was noted in *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962).

use one of its most effective civil investigative tools—*i.e.*, the summons procedure authorized by Section 7602 of the Code—once it refers the case to the Department of Justice for prosecution. See *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978); 26 U.S.C. 7602(c). Moreover, as the court below also noted (82-1452 Pet. App. 13a; 82-1509 Pet. App. 10a), cases involving false or fraudulent returns ordinarily place a far greater investigative burden on the Commissioner than other civil cases. That amended returns that purport to correct the original omissions may later be filed does not substantially reduce that investigative burden even though a thorough investigation may ultimately establish that the amended returns were not themselves fraudulent.[8]

3. While we believe the decision below is correct, we agree with the petitioners that there is a square conflict between this case and the Fifth Circuit's decision in *Nesmith*, on the one hand, and the Second and Tenth Circuits' decisions in *Britton* and *Dowell*, on the other. Moreover, the question is of considerable administrative importance. We are advised by the Internal Revenue Service that there are now 118 cases pending administratively with $11.8 million in taxes at stake, and 15 cases in litigation wih a total of $792,550 at issue. We agree that resolution of the conflict by this Court is therefore warranted.

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[8]Petitioner Deleet asserts (82-1509 Pet. 10-11) that the decision below "discourages the conscientious and repentant taxpayer" who has filed fraudulent returns from filing amended returns disclosing his true income. On the contrary, the decision is simply neutral in this regard, placing the taxpayer in neither a better nor worse position than he was before. At all events, as the court of appeals properly stated (82-1453 Pet. App. 11a; 82-1509 Pet. App. 8a), the relevant question is not whether it would be wise for Congress to create incentives for filing amended returns after fraudulent returns were filed, but rather, "whether Congress, in fact, did so."

CONCLUSION

The petitions for a writ of certiorari should be granted. The Court may wish to consolidate the cases.

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In The

Supreme Court of the United States

October Term, 1983

ERNEST BADARACCO, SR. and ROSE BADARACCO, ERNEST BADARACCO, JR. and BARBARA BADARACCO,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the filing of a non-fraudulent, amended return subsequent to the filing of a fraudulent original return commences the operation of the three year statute of limitations provided in section 6501(a), I.R.C. 1954; or, whether the unlimited period for assessment provided in section 6501(c)(1), I.R.C. 1954 continues to be the operative statutory authority once a fraudulent return has been filed.

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No. 82-1453

In The

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October Term, 1983

ERNEST BADARACCO, SR. and ROSE BADARACCO, ERNEST BADARACCO, JR. and BARBARA BADARACCO,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONERS

CITATIONS TO OPINIONS AND JUDGMENTS IN THE COURTS BELOW

Opinions:

Badaracco, et al. v. Commissioner of Internal Revenue, **Tax Court Memo. 1981-404 (Appendix D of Petition for Writ of Certiorari).**

Badaracco, Ernest, Sr. and Rose; Badaracco, Ernest, Jr. and Barbara v. Internal Revenue, ____ F.2d ____ (3rd Circuit, November 29, 1982), 50 AFTR 2d 82-6096 (Appendix C of Petition for Writ of Certiorari).

Judgments:

The judgment of the Third Circuit was entered on November 29, 1982 (Appendix B of Petition for Writ of Certiorari).

A petition for rehearing en banc was denied on December 20, 1982 (Appendix A of Petition for Writ of Certiorari).

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit (Appendix B of Petition for Writ of Certiorari) was entered on November 29, 1982. A petition for rehearing was denied on December 20, 1982 (Appendix A of Petition for Writ of Certiorari).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

On May 16, 1983 this Court granted the petition for writ of certiorari.

STATUTES INVOLVED

Section 6501, I.R.C. of 1954 as amended:

> (a) [as amended by Sec. 165(a), Excise Tax Technical Changes Act of 1958, Pub. L. No. 85-859, 72 Stat. 1275] *General Rule.*—Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within

3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

* * *

(c) *Exceptions.*—

(1) *False return.*—In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

* * *

(3) *No Return.*—In the case of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

Section 6653, I.R.C. of 1954 as amended:

(b) [as amended by Sec. 19(d), Revenue Act of 1962, Pub. L. No. 97-834, 76 Stat. 960, and by Sec. 313(e)(2)(B), Health Insurance for the Aged Act, Pub. L. No. 89-97, 79 Stat. 290] *Fraud*—If any part of the underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the

underpayment. In the case of income taxes and gift taxes, this amount shall be in lieu of any amount determined under subsection (a). In the case of a joint return under section 6013, this subsection shall not apply with respect to the tax of a spouse unless some part of the underpayment is due to the fraud of such spouse.

STATEMENT OF THE CASE

The issue presented in this appeal is whether the unlimited period of assessment provided for in section 6501(c)(1) of the *Code*[1] remains the operative authority when an amended non-fraudulent return is filed subsequent to there having been filed a fraudulent return.

This appeal follows the progression of these cases through the United States Tax Court (hereinafter the Tax Court) and the Third Judicial Circuit Court of Appeals (hereinafter the Third Circuit) based upon the following facts and judicial proceedings.[2] The taxpayers, Badaracco, had filed timely federal income tax returns for their taxable years 1965, 1966, 1967 and 1969. Their returns for the taxable year 1968 were filed late (March 28, 1969). Badaracco Brothers, the partnership in which Ernest Badaracco, Jr. and Sr. were members, filed its returns for the same years on the same dates as did the individuals. The partnership was engaged in the business of electrical contracting.

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1. Unless otherwise indicated, all references to the *Code* are to the Internal Revenue Code of 1954.

2. The facts recited herein are as such have been found by the Tax Court (Appendix D of Petition for Writ of Certiorari). Supplementary facts are referenced to the Joint Appendix (JA).

During 1970 and 1971 several grand juries had been impanelled in connection with activities in Hudson County in New Jersey, and the books and records of the partnership involving the Badaraccos were subpoenaed in connection therewith (JA20a). On August 17, 1971, the taxpayers filed non-fraudulent amended income tax returns and partnership information returns for each of the taxable years 1965 through 1969. The additional tax reported on the amended individual returns was paid at the time the returns were filed and was immediately assessed. On November 17, 1971 (three months after the amended returns were filed) Ernest Sr. and Ernest Jr. were indicted on fifteen counts under §7206(1) of the *Code*[3], accused of having filed both individual and partnership returns which they did not believe to be true and correct, for each of the years 1965 through 1969. The indictments were based upon the original returns and predicated upon the additional income shown on the amended returns. Both taxpayers entered a plea of guilty to the count relating to the charge for the year 1967 (JA24a). The remaining counts of the indictment were dismissed.

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3. SEC. 7206. FRAUD AND FALSE STATEMENTS.

Any person who—

(1) *Declaration Under Penalties of Perjury.*— Willfully makes and subscribes any return, statement, or other documents, which contains or is verfied by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

• • •

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

On November 17, 1977 (more than six years after the filing of the non-fraudulent amended returns) the Commissioner issued statutory notices of deficiency. Because the additional tax was paid with the filing of the amended returns, there was no further assessment to be made with respect to the tax. The notices of deficiency therefore, were directed only to the proposed assessment of the addition to the tax under section 6653(b) of the *Code*, the so-called fraud penalty of 50% of the deficiencies.

The Badaraccos petitioned the Tax Court for a redetermination of the statutory notices. While the case was pending before the Tax Court, the Tenth Judicial Circuit Court of Appeals (hereinafter the Tenth Circuit) was considering an appeal of the identical issue in *Dowell v. Commissioner* which had been appealed by Dowell from an adverse decision in the Tax Court [68 T.C. 646 (1977)]. In that case, the Tax Court had held in favor of the Commissioner's position that the subsequent filing of a non-fraudulent amended return after the filing of a fraudulent original return, did not trigger the operation of the general three year period of limitations under section 6501(a) of the *Code*. The Tenth Circuit reversed the Tax Court and established the precedent that an amended return which is non-fraudulent is entitled to the operation of the three year limitation period, even though the original return may have been false and fraudulent. *Dowell v. Commissioner*, 614 F.2d 1263, 45 AFTR 2d 80-855 (10th Cir. 1980).

The Tax Court, now once more faced with the issue in the instant cases and in another case (*Klemp*) which was also pending, reversed its prior ruling of *Dowell*, and followed the precedent of the Tenth Circuit. A written opinion of the full court was issued in *Klemp v. Commissioner*, 77 T.C. 201 (1981), on appeal (9th Cir. No. 81-7744) (Appendix E of Petition for Writ of Certiorari). The memorandum opinion in the instant cases simply followed the *Klemp* holding (Appendix D of Petition for Writ of Certiorari).

The Commissioner appealed the instant cases to the Third Circuit which reversed the holding of the Tax Court, and remanded the cases to the Tax Court (Appendix C of Petition for Writ of Certiorari). The decision of that Circuit placed it in conflict not only with the Tenth Circuit but also with the Second Judicial Circuit Court of Appeals (hereinafter the Second Circuit), which had followed the Tenth Circuit's opinion in affirming the United States District Court. *See Britton v. United States,* 532 F. Supp. 275, 49 AFTR 2d 82-472 (D. Vermont 1981), *aff'd without opinion* (2nd Cir. April 15, 1982). The writ of certiorari in the instant cases followed.

SUMMARY OF ARGUMENT

I. (a) The purpose and function of section 6501(a) of the *Code* is to provide a balance between the time required by the Commissioner to complete his administrative procedures for assessment of the tax, and the policy of repose to a taxpayer.

(1) Sections 6501(c)(1) and (3) of the *Code* are not statutes of limitations. They create no right of repose.

(b). The purpose of the unlimited time for assessment under sections 6501(c)(1) and (3) of the *Code* is to provide the Commissioner with the time necessary to overcome the deterrents placed in his way by a false and fraudulent return, or a failure to file; to overcome the disadvantageous position which has been created by the taxpayer.

(1) However, once the deterrent has been removed by the filing of an honest return then there is no longer any need for the unlimited time for assessment.

(c) The purpose and function of section 6501 of the *Code* is better served by an interpretation which favors the

commencement of a period of limitation, and a right of repose to the taxpayer.

(d) A statute of limitation is an almost indispensible element of fairness as well as of practical administration of an income tax policy. *Rothensies v. Electric Storage Battery Co., infra.*

(e) The facts in the instant case which show that, for whatever motive which impelled them, the taxpayers filed honest amended returns, which were accepted and acted upon by the Commissioner for both criminal and civil purposes; that all deterrents which had been created by the fraudulent returns were removed; and that the Commissioner waited for more than six years after the filing of the amended returns to propose a 50% penalty, compel the conclusion that to interpret section 6501 of the *Code* to permit no period of repose would be inequitable and unfair.

II. (a) The decisions of the Tenth Circuit in *Dowell, infra,* and the Tax Court in *Bennett, infra,* and *Klemp, infra,* correctly state the reasoning to support the conclusion that a non-fraudulent amended return albeit the original return was fraudulent commences the running of the general three year statute of limitations under section 6501(a) of the *Code.*

(1) The majority opinion of the Third Circuit in these cases, and the position of the Commissioner erroneously adopt the original position of the Tax Court in *Dowell, infra,* and fail to analyze the reasoning and analysis underlying the conclusion that the unlimited period for assessment has a purpose and once that purpose is satisfied, the reason for its existence ceases.

III. (a) A return which commences the statutory period of limitations to run is a return which meets the qualifications of being both a section 6501(a) return and the requirements of *Zellerback, infra; Lane-Wells, infra; Germantown Trust Co., infra;* and *Florsheim, infra.*

(1) By definition a false and fraudulent return cannot be a section 6501(a) return.

(2) A return which meets the definition of the aforesaid cases is one which evinces an honest and genuine endeavor to completely disclose the necessary information which is required in order that the Commissioner may perform his audit function.

(b) The majority opinion of the Third Circuit misinterprets the Tenth Circuit's reliance upon *Zellerback, infra;* and erroneously concludes that the basis for the decision of the Tenth Circuit was that the issue was resolved by the *result* in *Bennett, infra.*

(1) The influence of *Bennett, infra,* upon the Tenth Circuit was not its *result,* but the application of its *reasoning* with respect to the non-applicability of the continuation of the unlimited period of assessment.

IV. (a) The inquiry into the statutory interpretation is not satisfied by a mere literal reading of the statutory wording; but, because there is persuasive evidence to go beyond the words, an inquiry should be made into the statutory scheme.

(1) The conclusion of the majority opinion of the Third Circuit that there was a congressional intent to treat differently the situations of an original filing and the filing of a non-fraudulent amended return is not supported by statutory analysis.

(2) The approach to statutory interpretation utilized by Judge Hunter is the correct statutory analysis of this issue.

V. The position of the majority holding that "tax policy" considerations dictate the conclusion which it has arrived at does not find support in either the factual context of this case, or in

the application of the suggested considerations to a legal and logical resolution of the issue involved.

ARGUMENT

I.

The purpose and function of section 6501 of the *Code* is not served by an interpretation which results in there being no period of repose.

Section 6501 of the *Code* structures the statutory scheme of the statute of limitations for civil tax assessment and collection. Section 6501(a) sets forth the general rule that except as otherwise provided income taxes shall be assessed within a three year period after the return is filed. The exceptions are set forth in section 6501(c). There are two exceptions which are pertinent to our discussion. Section 6501(c)(1) provides:

> "(1) FALSE RETURN.—In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time."

Section 6501(c)(3) provides:

> "(3) NO RETURN.—In the case of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time."

The purpose of section 6501 is to provide a period of limitation within which the Commissioner may conduct his audit functions, before being foreclosed from making an assessment.

It also has the purpose of giving a taxpayer a right of repose. The court in *Britton v. United States, supra* described it in the following language:

> ". . . Section 6501 balances the policy to repose to the taxpayer with the purpose of providing the Commissioner of Internal Revenue adequate time to assess taxes and deficiencies. . . ."

Thus, under section 6501(a) the Commissioner is permitted a three year period to perform any audit functions and to assess the tax. However, should the taxpayer file a return which is false and fraudulent, or should he fail to file a return, he has placed the Commissioner in a disadvantageous position; he has placed a deterrent in the path of the Commissioner to perform his administrative functions. Because of this, Congress has provided the above exceptions of sections 6501(c)(1) and (3). These are exceptions to the right of repose granted a taxpayer. The exceptions are there in order to give the Commissioner time to ferret out the true facts with respect to the taxpayer's filing status. *Cf., Dowell v. Commissioner, supra. See The Colony Inc. v. Commissioner,* 357 U.S. 28 (1958), 1 AFTR 2d 1894.

The Tenth Circuit in *Dowell* defined the essence of section 6501. Whereas the statute of limitation in section 6501(a) stops the running of a prescribed period for assessment and provides a period of repose to the taxpayer, section 6501(c) is the "antithesis of a limitation concept, and in the absence of anything else, the commencement of any period of repose for fraudulent or evasive 'returns' is put in limbo."

Were it not for the fact that the Commissioner encourages, accepts and acts upon amended returns, the parameters between sections 6501(a) and 6501(c)(1) and (3) would be well defined. However, the Commissioner does accept such returns, and when

he does the question arises as to the impact of an honest amended return albeit a fraudulent return was originally filed, for an honest return removes the Commissioner from the disadvantageous position in which he was originally placed. The deterrent to his administrative function is removed. He now has all the information he needs in order to complete his assessment process. *Cf., Balkan National Insurance Co. v. Commissioner,* 101 F.2d 75, 22 AFTR 428, 431 (2nd Cir. 1939); *Stockstrom v. Commissioner,* 190 F.2d 283, 40 AFTR 1011 (Dist. of Col. Cir. 1950); *The Colony, Inc. v. Commissioner, supra.*

The Commissioner in the lower courts and in his brief in this Court with respect to the application for certiorari emphasizes the point that there is no statutory authority in the Internal Revenue Code for the filing of amended returns. He quotes from the recent opinion of this Court in *Hillsboro National Bank v. Commissioner,* ____ U.S. ____, slip op. 8 n.10 (March 7, 1983), 51 AFTR 2d 83-874 that the acceptance is "within the discretion of the Commissioner." He ignores the fact that in the instant cases the Commissioner has exercised this discretion; that he accepted the amended returns and acted upon them for both criminal and civil purposes. There is not present here the question of whether the amended returns should be accepted. Once accepted they took on the status of valid returns albeit they were amended returns. For this reason *Hillsboro, supra,* and cases cited therein are not apposite.

The issue before this Court therefore concerns the inquiry as to whether the statute of limitation provisions of the Internal Revenue Code are served by a literal interpretation which mandates that under no circumstances is there ever to be a period of repose; or, whether the balancing of the needs of the Commissioner against a policy of repose to taxpayers requires that once the needs of the Commissioner are satisfied, then the reason for the exceptions to section 6501(a) no longer exist, and therefore the statute is

better served by an interpretation which favors the commencement of a period of limitation. Later in this brief, a discussion of the decision in *Bennett v. Commissioner*, 30 T.C. 114 (1958) acq. 1958-2 CB 3, and the ruling of the Commissioner Rev. Rul. 79-178, 79-1 CB 435 will reveal that with respect to the unlimited period of section 6501(c)(3) there are circumstances which obviate that particular exception to section 6501(a). It remains for this Court to determine the question with respect to section 6501(c)(1).

The persuasive distinction made by the Tenth Circuit, which the government fails to recognize and which the Third Circuit did not discuss; namely, that section 6501(c)(1) is not a statute of limitation but the "antithesis" of such, is an important consideration to understand. For when it is understood that this issue does not entail the construing of a statute of limitation, but the effect of the subsequent filing of a non-fraudulent amended return upon the *exception* to the statute of limitation, then cases which favor strict construction of statutes of limitation in tax matters such as *Pacific Coast Steel Co. v. McLaughlin*, 61 F.2d 73, 11 AFTR 880 (9th Circuit, 1932), *aff'd*, 288 U.S. 426 (1933), 12 AFTR 11 and *Bowers v. New York and Albany Literage Co.*, 273 U.S. 346 (1927), 6 AFTR 6541 are not applicable. The inquiry is whether albeit a fraudulent return has been filed, if the Commissioner at a later date by means of an amended return is furnished with all the information he requires in order to make an assessment, and in fact does make the assessment, in all fairness is the taxpayer still to be denied repose. The purpose and function of a statute of limitation provision is to, in as fair and equitable way as possible, balance the needs of the Commissioner against the right of a taxpayer to repose. This is exactly what this Court stated in *Rothensies v. Electric Storage Battery Co.*, 329 U.S. 296 (1946), 35 AFTR 297:

> "It probably would be all but intolerable, at least Congress has regarded it as ill-advised, to have

> an income tax system under which there never would come a day of final settlement and which required both the taxpayer and the Government to stand ready forever and a day to produce vouchers, prove events, establish values and recall details of all that goes into an income tax contest. Hence a statute of limitation is an almost indispensable element of fairness as well as of practical administration of an income tax policy."

It is to be observed that this absence of a period of repose in the civil process is in stark contrast to another section of the Internal Revenue Code which stipulates a defined period of limitation in the criminal process. Section 6531 of the *Code*.[4] The

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4. SEC. 6531. PERIODS OF LIMITATION ON CRIMINAL PROSECUTIONS.

> No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years—
>
> . . .
>
> (2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;
>
> (3) for the offense of willfully aiding or assisting in, or procuring, counseling, or advising, the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim or document);

(Cont'd)

incongruous result is that a taxpayer after six years, is given repose with respect to any criminal penalties; but, according to the Commissioner's position, is never given repose in a civil matter even if he cooperates in the collection process by filing an honest return. The cruelty of such reasoning is obvious from the facts in this case, for here the Commissioner reaped the fruits of an honest return. At the time the amended returns were filed, the taxpayers were not under personal investigation as to their original returns. Their books and records had been subpoenaed in conjunction with an investigation of certain activities in county government. Whatever may have been their motive, they decided to rectify their incorrect returns and they filed honest returns. The Commissioner accepted these returns as being honest and acted upon them. Simultaneously with the filing they paid their due taxes and were assessed. Three months after having filed, they were indicted, with these returns as the substance of the prosecution. The record is clear that the returns were honest and, having paid the liabilities disclosed thereon, there was no further determination by the Commissioner that they owed any further tax. The only remaining determination to be made by the Commissioner was that, in addition to the criminal penalties, the taxpayers were liable for the civil fraud penalty. This is a simple calculation of 50% of the additional tax which had been paid. Section 6653(b) of the *Code*. There was no longer any need for the Commissioner to have an unlimited period to investigate or audit the returns. His deterrent had been removed. Yet it required

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(Cont'd)

> (4) for the offense of willfully failing to pay any tax, or make any return (other than a return required under authority of part III of subchapter A of chapter 61) at the time or times required by law or regulations;
>
> (5) for offenses described in sections 7206(1) and 7207 (relating to false statements and fraudulent documents); . . .

more than six years after the amended returns had been filed to issue his statutory notice. Under the reasoning of the Commissioner he could have waited indefinitely to make his proposed assessment of the penalty. There would be no repose to the taxpayer. Forever, throughout his lifetime, he would live under an unexploded time bomb. This unfair and unreasonable result is described by Judge Wilbur in his concurring opinion in *Klemp:*

> ". . . Respondent would leave the statute open for that portion of eternity concurrent with the taxpayer's life, whether he lives three score and ten or as long as Methuselah. In most religions one can repent and be saved but in the peculiar tax theology of respondent no act of contrition will suffice to prevent the statute from running in perpetuity. Merely to state the proposition is to refute it, unless some very compelling reason of policy require visiting this absurdity on the taxpayer. . . ."

Judge Hunter in his dissent described it as the "Sword of Damocles."

It is submitted that section 6501 of the *Code* was never intended to have such an inequitable result. The Tenth Circuit in *Dowell* emphasized that "the 'at any time' assessment is not a further penalty" and that "no irrevocable forfeiture of the benefits of limitation period is contemplated as an additional punishment or penalty."

II.

The unlimited period for assessment terminates once the purpose for its existence is satisfied.

The issue of an unlimited period for assessment has been present in one form or another throughout the existence of tax law. *See Goodman,* 24 University of Cincinnati Law Review 70 (1955). The purpose for its existence has been generally agreed upon by the courts; namely, to allow the Commissioner the time to make an examination and perform his audit functions when the necessary information for determining liability is lacking. However, once the Commissioner has the necessary information and time to make the assessment then there is no further reason for its existence *cf., Balkan National Insurance Co.* and *Stockstrom, supra.* In *The Colony, Inc. v. Commissioner, supra,* this Court noted that the congressional purpose underlying section 275(c) of the Internal Revenue Code of 1939 was

> ". . . to give the Commissioner an additional two years to investigate tax returns in cases where, because of a taxpayer's omission to report some taxable item, the Commissioner is at a special disadvantage in detecting errors. In such instances the return on its face provides no clue to the existence of the omitted item."

The Tax Court in *Klemp, supra,* noted:

> ". . . Similarly the purpose of section 6501(c)(1) is to provide the Commissioner with an unlimited amount of time when he is at a special disadvantage based on the taxpayer's fraud. . . ."

This question of the unlimited time for assessment while present in the above mentioned cases and others prior to *Dowell*

and *Klemp*, did not involve the precise situation which now confronts the Court. It remained for the case of *Bennett v. Commissioner, supra*, to furnish the precedent for the *Dowell* case and this particular situation.

One cannot ignore the strong influence of *Bennett* upon the question now before this Court. That case arose under section 276(a) of the Internal Revenue Code of 1939, which read as follows:

> "Section 276. Same-Exceptions.
>
> (a) False Return and No Return. In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time."

This section comprehended within the one provision, that which is now contained in sections 6501(c)(1) and (3) of the *Code*. *Bennett* involved a failure to file situation. Moreover, the failure to file was determined by the Tax Court to have been deliberate and fraudulent with the intent to evade tax (124). Delinquent returns were filed. The Commissioner's attempt to assess, was made more than three years after the filing of the delinquent returns, based upon his longstanding position that the unlimited period of assessment was not terminated by any action subsequent to the interdicted act. The Tax Court rejected this position stating:

> ". . . For, once a non-fraudulent return is filed, putting the Commissioner on notice of a taxpayer's receipts and deductions, there can be no policy in favor of permitting assessment thereafter at any time without limitation. . . ." (123).

The court concluded that the filing of the delinquent returns, even though the non-filing was false and fraudulent, commenced the running of the statutory period of limitation.

The *Bennett* case's influence upon this issue is reflected in the consideration given to it in *Dowell* and *Klemp*. When *Dowell* was before the Tax Court, the taxpayer relied upon *Bennett* only to have the court reject it as precedent, stating that it presented a different "situation." The Tenth Circuit, however, found the reasoning set forth (quoted above) to be "equally compelling" in a fraudulent return situation as in a fraudulent failure to file situation. When the issue once more came before the Tax Court in *Klemp*, the court quoted from its *Bennett* opinion and then held that it was also applicable to a fraudulent return situation.

The majority opinion in the Third Circuit in these cases reverts to the Tax Court's original position in *Dowell*, and ignores the reasoning of both the Tenth Circuit in *Dowell* and the Tax Court in *Klemp*. Specifically, the Tenth Circuit had stated that the question was not the distinction between a delinquent return and a fraudulent return, as had been made by the Tax Court in its *Dowell* opinion, but whether the delinquent return and the nonfraudulent return provided the Commissioner with all the required information so that there was no longer any need for an unlimited time for assessment.

The *Bennett* case has also had its influence upon the policy of the Commissioner with respect to section 6501 of the *Code*. Not only has he acquiesced in *Bennett* but as a policy matter he has adopted the reasoning of the case. Rev. Rul. 79-178, 79-1 CB 435. In the ruling, the statement is made:

> "The imposition of a civil fraud penalty under section 6653(b) of the Code does not necessarily indicate that tax can be assessed at any time under section 6501(c)."

Although the ruling is concerned with a non-filing situation, the policy, as indicated by the quoted language, does not restrict itself to subsection 6501(c)(3), but refers to the entire section 6501(c) of the *Code*. In effect, what the Commissioner is saying in the ruling is that the incidence of fraud is not necessarily connected with the unlimited period for assessment. It suggests that the controlling factor is whether a return when later filed, is itself not fraudulent; that the fraud, in order to maintain the unlimited period must be related to that particular return. It is apparent that the Commissioner recognizes that the unlimited period is not sacrosanct. However, his persistence in litigating the present issue is an indication that he fails to give recognition to the reasoning of the *Bennett* opinion; that is, that the delinquent return starts the commencement of the general statute of limitation because now he is possessed of all the necessary information in order to make his assessment. The Commissioner obviously insists that the governing law on the instant issue is the erroneous conclusion of the Tax Court in *Dowell*, that is making a distinction between a non-filing situation and a fraudulent return situation. However, the Tax Court recognized its error when it wrote the opinion in *Klemp*, and reiterated its true reasoning in *Bennett*.

The Third Circuit falls into this same error. Its decision reflects upon the distinction between the two situations. Nowhere does the Third Circuit refer to, or discuss, the line of reasoning or the cases which reflect the position that the unlimited period for assessment has a purpose, and once that purpose is satisfied, the reason for the existence of the unlimited period ceases. It does casually make reference to this as an argument advanced by the taxpayer, but it does not discuss it as the Tenth Circuit did in *Dowell*. In this, the Third Circuit is remiss for it misses the entire point of the issue. The Tenth Circuit cogently pointed out that rather than being concerned with the question of what is the statute of limitation, the specific question is whether there occurs an event which triggers the start of the statutory period.

III.

A non-fraudulent amended return is a return for purposes of section 6501(a) of the *Code*, albeit there was filed an original return which was subject to the provision of section 6501(c)(1) of the *Code*.

The purposes and spirit of section 6501(c)(1) of the *Code* being established, we inquire into the question of how and when the unlimited period for assessment ceases to exist, thereby triggering the operation of the general three year statute under section 6501(a) of the *Code*.

The threshold question is what constitutes a return for purposes of section 6501(a). Obviously a fraudulent return does not, otherwise section 6501(c)(1) would not be the operative provision. The answer is that in order for a return to be one which starts the running of the statute, it must be one which evinces an honest and genuine endeavor to completely disclose the necessary information which is required by law in order that the Commissioner may perform his assessment function. *Cf.*, *Zellerback Paper Co. v. Helvering*, 293 U.S. 172 (1934), 14 AFTR 688. In *Commissioner of Internal Revenue v. Lane-Wells Co.*, 321 U.S. 219 (1944), 31 AFTR 970, 972, this Court stated as follows:

> "Congress has given discretion to the Commissioner to prescribe by regulation forms of returns and has made it the duty of the taxpayer to comply. It thus implements the system of selfassessment which is so largely the basis of our American scheme of income taxation. The purpose is not alone to get tax information in some form but also to get it with such uniformity, completeness, and arrangement that the physical

> task of handling and verifying returns may be readily accomplished. . . ."

Germantown Trust Co. v. Commissioner of Internal Revenue, 309 U.S. 304 (1940), 23 AFTR 1084 involved a return which contained all the data from which a tax could be computed and assessed, but it did not compute the tax because it was filed on the wrong form. The Commissioner argued that it was not a return. This Court disagreed and held that it was a return because the mere failure to have computed the tax when all the necessary data and information was furnished fell "short of rendering it no return whatever." In *Florsheim Bros. Dry Goods Co., Ltd. v. United States*, 280 U.S. 453 (1930), 8 AFTR 10281, this Court when discussing a "defective or incomplete" return which could start the running of the statute of limitations emphasized that it is because such "defective or incomplete return purports to be a specific statement of the items of income . . . and, to have that effect, it must *honestly* and *reasonably be intended* as such." (italics supplied).

Contrary to the implication which appears in the majority opinion in the Third Circuit, the Tenth Circuit did not hold that the original returns were not returns for any purpose, but that such were not returns for purposes of section 6501(a) because they did not *start* a period of limitation. The statement of the court was:

> "The fraudulent returns . . . were really not 'returns' within the meaning of §6501(a) or *Zellerback*. They started no statute of limitations. . . ."

The inquiry as to what constitutes a "return" has been before the courts on many occasions. It would serve no purpose to survey the various types of documents which have been labeled as not being a return. These can range from unsigned returns to protester

returns and the application of *Zellerback* or any other case to these documents have no relevancy to the issue here. The specific inquiry here should not be directed at whether the original return was in effect a return, although the Third Circuit would appear to read *Dowell* in this fashion. The specific inquiry should be whether the amended return met the requirements of *Zellerback, Lane-Wells, Germantown* and *Florsheim*. Having removed the impediments which the original return created, and by so creating, placed the Commissioner in a disadvantageous position, the reason for the operation of the unlimited period for assessment no longer existed. Therefore, the amended return became a return for purposes of section 6501(a).

The Third Circuit misinterpreted the Tenth Circuit's reliance upon *Zellerback*. In footnote 4, it comments that *Zellerback* does not address itself to an amended return rendering the original return a nullity for purposes of the statute of limitations. But this was not the import of the Tenth Circuit's opinion. That court follows its quote from *Zellerback* with the statement:

> "Thus once the taxpayer has evinced an honest and genuine effort to satisfy the law by filing such a return, the §6501(a) period begins to run."

When the Third Circuit states that *Zellerback* does not render "the original return a nullity for the purpose of the statute of limitation" it makes a meaningless comment, for in order to be rendered a nullity there would have to have been the situation that it was once not a nullity. But this is not true, and no one would suggest that the original return was ever a return for the purpose of the statute of limitation. It was a return for purposes of the exception to the statute and that is why the Commissioner could, in the absence of the amended return, invoke section 6501(c)(1). What the Tenth Circuit said was that because the original return did not meet the tests of *Zellerback*, then it was

not a return for the purpose of section 6501(a). But whether it applied *Zellerback* to the original return or not, this would have been the correct label for the original return since it was false and fraudulent. It was a section 6501(c)(1) return, not a section 6501(a) return. The Tenth Circuit was really emphasizing *Zellerback* in relation to the amended return, and once this was established then the further application of *Colony, supra* and *Bennett, supra,* of the "no policy in favor of permitting assessment thereafter at any time without limitation" led it into its conclusion that the amended return was a return which started the running of the statute of limitations. This interpretation of the Tenth Circuit's opinion becomes clear from its statement:

> "The question would seem to be whether taxpayers have filed a return that meets the requirements of §6501(a) and *Zellerback,* not whether the return was 'original' or 'amended'."

It was from this erroneous interpretation of *Dowell* that the Third Circuit then compounded its error by concluding that the basis of the Tenth Circuit's decision was that the situation was resolved by the conclusion in *Bennett.* However, the opinion of the Tenth Circuit is clear that the influence of *Bennett* was not its *result,* but the application of the *reasoning* in *Bennett* with respect to the non-applicability of the continuation of the unlimited period.

The Tenth Circuit was no stranger to the inquiry of what constitutes a return for purposes of the statute of limitations. In an earlier case, it had before it a situation somewhat similar to the instant one in that the critical question was whether an amended return was a return for purposes of the statute of limitations, and the original was one which was not sufficient to start the period. *John D. Alkire Inv. Co. v. Nicholas,* 114 F.2d 607 (10th Cir. 1940), 25 AFTR 678. There the taxpayer had filed

an original return which failed to include rental income. Although there was no fraudulent intent connected with the omission, the factual pattern is the same as in the instant situation except for this fact. At a later date, an amended return was filed which included the income. Once more there is a parallel with the instant case. The position of the Commissioner was that because the original return did not disclose the information with respect to rental income, it was not a return which would start the period of limitation; but that the amended return which cured the lack of information was the effective return for statute of limitation purposes. As noted, except that in the instant case there is a fraud element involved, the cases are factually similar. It can be assumed that if in the instant case, the fraud feature was not imposed upon the original return, and the Commissioner had to rely upon the amended returns as a starting point, he would adopt the same position he did in *Alkire*. In holding that the amended and not the original returns triggered the statute of limitations, the Tenth Circuit made the following statements:

> ". . . Section 239 and 52 (I.R.C. 1926) supra, respectively required every corporation to make a return 'stating specifically the items of its gross income and the deductions and credits allowed* * *.' The burden was thus cast upon the taxpayer to furnish by return the information on which assessments were to be made. And by providing that the period of limitation should begin to run from the filing of the return, the statute manifested a clear legislative intent that the period should begin only when the taxpayer had furnished such information in the manner prescribed Florsheim Bros. Co. v. United States, 280 U.S. 453, 50 S. Ct. 215, 74 L. Ed. 542. Meticulous accuracy, perfect completeness, or absence of any omission is not exacted. But a return which fails

to comply in a substantial degree with the requirements of the statute in respect to disclosing the requisite information essential to the making of assessments does not suffice to start the period of limitations."

". . .While there was no intentional fraud, wilful negligence or purposed attempt at evasion of tax on the part of the taxpayer, the returns not only failed to disclose requisite information but were misleading and calculated to prevent discovery of material facts. Returns of that kind are not effective to start the period of limitation running. Compare Florsheim Bros. Co. v. United States, supra; Lucas v. Pilliod Lumber Co., 281 U.S. 245, 50 S.Ct. 297, 74 L.Ed. 829, 67 A.L.R. 1350; Germantown Trust Co. v. Commissioner, 309 U.S. 304, 60 S.Ct. 566, 84 L.Ed. 770; United States v. National Tank & Export Co., 5 Cir., 45 F.2d 1005, certiorari denied, 283 U.S. 839, 51 S.Ct. 487, 75 L.Ed. 1450; Myles Salt Co. v. Commissioner, 5 Cir., 49 F.2d 232; National Contracting Co. v. Commissioner, 8 Cir., 105 F.2d 488.

Since the assessments were made within the period of limitation after the filing of the so-called amended returns, they were not barred by limitation."

The conclusion to be drawn from the *Germantown, Florsheim, Lane-Wells* and *Zellerback* cases is that when a return honestly sets forth all the necessary information from which the tax can be computed and the assessment made, then it is a return for purposes of starting the running of the statute of limitations. The Tenth Circuit in *Dowell* pointed out that it is not pertinent

whether such a return is an original or amended document. With this as a conclusion, then the reasoning in *Bennett,* and adopted by the Tenth Circuit in *Dowell,* that "there can be no policy in favor of permitting assessment thereafter at any time without limitation" is sound law with respect to the situation in the instant case. In his dissent, Judge Hunter expressed this result as follows:

> ". . .The general rule, therefore, should govern. *Dowell* 614 F. 2d at 1265. That interpretation also avoids the distorted result reached by the majority. Under the majority's holding, once a fraudulent return is filed, the threat of future assessment of deficiencies will hang in perpetuity like the Sword of Damocles over the head of the taxpayer, despite his efforts to set the record straight."

IV.

The interpretation to be accorded to section 6501 of the *Code* requires more than a literal reading of the statutory provisions.

The opinion of the Third Circuit, in which the panel divided two to one, presents divergent interpretations of the effect of a non-fraudulent amended return upon the various provisions of section 6501 of the *Code.* Whereas the majority holds to a literal reading of the statutory scheme, quoting from Judge Hand that one should not lightly go beyond the plain language of a statute; the dissent postulates that merely reading the plain words in the present instance does not end the inquiry. Judge Hunter's approach is influenced by pronouncements of this Court which he quotes as follows:

> "4. While recognizing that '[t]he starting point in every case involving construction of a

> statute is the language itself.' *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 756 (1975) (Powell, J. concurring), the Court has recently admonished that 'ascertainment of the meaning apparent on the face of a single statute need not end the inquiry. . . .' This is because the plain meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.' " *Watt v. Alaska,* 451 U.S. 259, 266 (1981), *quoting Boston Sand Co. v. United States,* 278 U.S. 41, 48 (1928).

Judge Hunter also employs Judge Hand to lend support to his approach to statutory construction. In footnote 2 he quotes as follows:

> "2. Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning. *Cabell v. Markham,* 148 F.2d 737, 739 (2d Cir.) (L. Hand, J.), *aff'd,* 326 U.S. 404 (1945)."

The literal approach employed by the majority ignores the issue in the case. Because it saw nothing on the face of the statute to demonstrate the effect of an amended return on section 6501(c)(1), it was content to end its inquiry. Both the *Dowell* and *Klemp* cases refer to legislative history, indicating that the courts

in those cases went beyond the mere words of the statute before rendering their decisions. Not only does the majority, aside from a few comments on the *Dowell* decision, appear to bypass the cogent arguments made by the Tenth Circuit in rejecting the Commissioner's position, but it also appears to ignore the statutory construction made by both the *Dowell* and *Klemp* cases.

Following the admonition of this Court as to statutory construction, the minority found "persuasive evidence" to go beyond the mere words of the statute. Judge Hunter recognized the troublesome area of inquiry by identifying the issue not to be the *clarity* of the words in the statute when the situation involves section 6501(c)(1), but the *lack of clarity* when the situation is effected by the filing of a nonfraudulent amended return.

The divergency in the conclusions arrived at by the Tenth and Third Circuits is explicitly demonstrated in their expressions of how they ascertained congressional intent. The Tenth Circuit criticized the position of the Commissioner for failing to recognize that sections 6501 (c)(1) and (3) are *in pari materia* and should be construed consistently with one another. The Third Circuit agrees with this reasoning. The Tenth Circuit then went on to review the legislative history which showed that the unlimited period for assessment for a fraudulent filing and for a failure to file have been included in the same subsection from the Revenue Act of 1921 to the Internal Revenue Code of 1954. The latter, however, while retaining both in the same subsection for some undisclosed reason placed them into separate subdivisions. The court made the conclusion.

> "Congress provided no indication that it intended statute of limitations treatment to differ between taxpayers who filed fraudulent returns, and those who fraudulently failed to file."

The Third Circuit ended up with the conclusion (footnote 6):

> ". . . we believe that Congress provided a clear indication in 6501(a) that it did intend 'statute of limitations treatment to differ between taxpayers who filed fraudulent returns, and those who fraudulently failed to file.' "

The Third Circuit gives undue consideration to the parenthetical clause of section 6501(a) in support of its conclusion that Congress has "differently" treated the filing of an original return which is filed late and a fraudulent original return. It quotes the clause: "(whether or not such return was filed on or after the date prescribed)" as support for its conclusion. This clause which first appears in the 1954 Code was merely a codification of existing law. *Cf., Automobile Club of Michigan v. Commissioner of Internal Revenue,* 353 U.S. 180 (1957), 50 AFTR 1967. There one of the questions before this Court was the date for the commencement of the three year limitation period with respect to a late filed original return. The applicable provision was section 275(a) of the 1939 Code, which, as noted, did not contain this provision. This Court interpreted said section as follows:

> ". . . The assessments were therefore within time under §§275(a) and 276(b)[14] unless, as the petitioner asserts, the statute of limitations began to run from the dates when, if there was a duty to file, the statute required filing.[15] The petitioner argues that because its omission to file on March 15, 1944, and March 15, 1945, was induced by the Commissioner's 1934 and 1938 rulings, it is only equitable to interpret the statute of limitations as running from those dates in the circumstances of this case. But the express condition prescribed by the Congress was that the statute was to run against

> the United States from the date of the actual filing of the return, and no action of the Commissioner can change or modify the conditions under which the United States consents to the running of the statute of limitations against it. In *Lucas v. Pilliod* Lumber Co., 281 U.S. 245, 249, 50 S.Ct. 297, 299, 74 L.Ed. 829, this Court held:. . . ."

The conclusion of the Third Circuit therefore, that there was a congressional intent as indicated by section 6501(a) to treat the two situations differently is not supportable. The parenthetical clause only reflects the long standing rule of law as enunciated by this Court, and cannot be said to have been placed in the 1954 Code because Congress had in mind a different treatment to be given to original and amended returns.

Had the non filing return in *Bennett* not been fraudulent there would not have been an issue, for the delinquent return would have started the period. The issue in *Bennett* was whether the general rule did not apply because the failure to file was fraudulent and therefore 276(a) did not apply. The *Bennett* case was not merely a matter of a delinquent filing, but a delinquent filing after a fraudulent failure to file.

One of the weaknesses in the Third Circuit opinion is the statement that there is nothing in the Internal Revenue Code which indicates that Congress intended parties who filed fraudulent returns to be permitted to take advantage of the general statute of limitations, and that such a person cannot escape the civil and criminal penalties or eradicate the fraud by merely filing a non-fraudulent return. Here the court appears to ignore the fact that such is equally applicable to the situation of a fraudulent non-filing. No one suggests that by reason of filing a non-fraudulent return the penalties or the fraud are eradicated. These penalties remain. The pertinent question is, does the non-fraudulent return

start the period of limitation, for if the Commissioner acts within this period, he can assess the penalties. The stigma of fraud once it attaches is never eradicated. What is eradicated is the possibility of assessment, and it is the assessment which is prohibited. But this is due to the Commissioner's own failure to act within the prescribed time, not to the return per se. For some reason the majority failed to understand this result, although it was quite clear to Judge Hunter (*see* footnote 7 of dissent).

Judge Hunter's opinion makes a strong case for statutory analysis which goes beyond the mere literal reading of the words of the statute. He found "sufficient persuasive evidence" in the form of amended returns which, while not being part of the explicit statutory scheme enacted by Congress have, nevertheless, been made "an integral part of the administrative scheme" by the Commissioner's regulations and policy; of a reasonable alternative interpretation of the statute as evidenced in *Dowell;* and, of the distorted results which would emanate from the majority's holding, to convince him that resort only to the literal reading of the statute was not a sufficient inquiry into the issue. This discerning jurist also raised a provocative inquiry when he questioned as to how the effect of amended returns upon the statute of limitations can be discerned solely from the literal language of the statute, when such are not part of the statutory scheme as enacted by Congress, but are a creation of the Internal Revenue Service. Because such are part of the administrative scheme rather than of the statutory scheme, the effect upon the statute of limitations must be analyzed by going beyond the literal reading of the statute.

When the related provisions of section 6501 are analyzed, rather than being read literally, the strong reasoning of *Dowell* becomes clear; namely, that once a return is filed which supplies both the requirement of section 6501(a) and of *Zellerback,* then the general statute of repose becomes available to a taxpayer.

V.

Factually and substantively "tax policy" considerations are not applicable to the issue.

Both the majority and the dissent in the Third Circuit disavow any role in "tax policy." However, whereas the dissent merely makes the statement, the majority clearly adopts the arguments of the Commissioner that the *Dowell* precedent interferes with his policy considerations. The majority, in effect, does permit these considerations to influence its decision. Both factually and substantively this is incorrect.

Factually the so-called policy considerations set forth by the majority do not reflect the facts in this case. The key sentence that ". . .It has long been the policy of the I.R.S. to defer civil assessments and collection until the completion of criminal proceeding" could have no application to the criminal and civil limitations periods which are involved with respect to the taxable years in issue. The earliest return, that for the taxable year 1965, was filed on April 15, 1966. The Commissioner had until April 16, 1972 to bring a criminal indictment. Later returns had later dates. On November 19, 1971 well within the criminal expiration date for the taxable year 1965 indictments were obtained for all the taxable years involved. The amended returns had been filed on August 17, 1971, three months before, and had been accepted by the Commissioner and were the basis for the section 7206(1) indictments. The tax reported on the returns was paid with the returns and was assessed immediately. It was not until six years later, November 21, 1977, that the statutory notices proposing the assessment of the 50% fraud penalty under section 6653(b) of the *Code* were issued. There could be no policy considerations to support this delay of more than six years after the securing of the indictments to support such a delay. The criminal proceedings had been concluded within the time frame of the three

year period of limitations commencing with the date of the filing of the amended returns. This expiration date would have been August 17, 1974. It was pure procrastination on the part of the Commissioner. This procrastination is demonstrated by the circumstance that there was no need for the period of six years, or indeed even of three. No investigation or audit was required. There remained only the assertion of 50% of the additional tax shown on the amended return over the original return. It is not possible to reconcile any policy consideration to these facts. The proposed assessments could well have been made within three years of the filing of the amended returns. The dictum of *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962), 10 AFTR 2d 5279, cited by the Third Circuit is not apposite here. That case involved a dismissal of a refund suit based upon a motion made by the plaintiff taxpayer for discovery. The refund suit was contemporaneous in time with a criminal proceeding. The Fifth Circuit reversed the dismissal and remanded the case for a full trial on the merits. Apparently in that case what was involved was an abuse of discretion by the trial judge under the rules of discovery. In the instant situation, the criminal proceedings had concluded within the time frame of the three year period of limitations from the date of the filing of the amended returns.

The position of the Commissioner, as reflected by the majority opinion appears to be that he should have the aid of the judiciary in defeating any attempt to restrict his policy considerations; that the judiciary should, in effect be a party to his administrative policy. The answer to this approach is that this, or any other Court, should not be a partner with the executive branch of government. When the rationale, as expressed by the Tenth Circuit, and followed by the Tax Court, is well founded, the issue should be decided upon its merits, and not upon an appeal for administrative relief. The remedy lies within the Commissioner's own office; he need only to structure his administrative procedures to afford and guarantee due process to each and every taxpayer.

The civil sections of the Internal Revenue Code were never intended to be an adjunct to the criminal provisions, so as to be used only to aid the Commissioner in pursuing the latter. Congress did not intend when it promulgated section 6501 of the *Code* and its predecessor statutes, that such were mere adjuncts to the criminal statutes, the gratuitous statement made by the Third Circuit to such effect notwithstanding. There is nothing in legislative history of any of the statute of limitations sections to support such a statement.

The opinion of the majority in relying upon the argument that the discovery of fraud in a return is support for an unlimited period for assessment is misleading in the least. It ignores the fact that the amended return gives the Commissioner all the data and information he needs, and was lacking, in order to conduct his investigation. The assumption made by the Third Circuit's position is that the Commissioner's investigation is primarily to ascertain enough evidence to prove a fraud case, and only then he will make his tax deficiency determination. This places the proverbial cart before the horse. Experience in the auditing process demonstrates that the Commissioner first determines whether there is unreported income, and then he proceeds to a determination of the penalty under section 6653(b). Experience also reveals that he attempts to make all deficiency determinations within the normal three year period, even when a return is suspect. This is in order that the deficiency determination will thereby be preserved without the necessity of relying upon proof of fraud in order to keep the statute open. The Commissioner always seeks to preserve the determination of a deficiency in tax. The assertions of a fraud penalty is not merely to claim the advantage of section 6501(c)(1) but it is an additional determination. As a general rule the determination of the tax is made within the three year period, and the penalty is added to the tax determination. The error in Judge Parker's quoted dissent, and in the Third Circuit's statement, is that there is the implication that the Commissioner

needs longer than three years to gather evidence of fraud, even though he may have the evidence of unreported income. This hypothesis overlooks the fact that the gathering of evidence with respect to unreported income is contemporaneous with the marshalling of evidence to support fraudulent conduct. The two go hand-in-hand. This argument is simply not a correct appraisal of the administrative process.

Not to be overlooked is that the majority opinion has no problem in recognizing the correctness of *Bennett*. Yet the policy considerations he finds serious in this case are as equally compelling in a *Bennett* situation. There also, fraud is involved; there also, the matter of a criminal prosecution is present; there also, the Commissioner has the burden of ferreting out the fraud. Yet the majority would not hold that the general three year statute was not triggered by the filing of the delinquent return. To rely upon policy considerations in the instant cases, and not in *Bennett* just does not make good common sense.

CONCLUSION

Based upon the foregoing analysis, statutory construction and case law, the petitioners respectfully submit that the decision of the Third Judicial Circuit Court of Appeals be reversed.

Respectfully submitted,

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Nos. 82-1453 and 82-1509

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ERNEST BADARACCO, SR., *et al.*,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DELEET MERCHANDISING CORP.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONER, DELEET MERCHANDISING CORP.

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Question Presented

Does the subsequent filing of a complete and honest amended return start the running of the statute of limitations provided in Section 6501(a) as Taxpayer contends, or does the filing of an allegedly fraudulent return give the Government the right in perpetuity to assess deficiencies and penalties—no matter what remedial steps are taken by the taxpayer—as the Government contends?

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR PETITIONER, DELLET MERCHANDISING CORP.

Opinions Below

The opinion and order of the District Court for the District of New Jersey, dated and entered December 22, 1981, is reported at 535 F.Supp. 402. A copy of that opinion is reproduced at page 1d of the Appendix filed as part of Petitioner's Petition for a Writ of Certiorari. The opinion of the Court of Appeals for the Third Circuit, dated November 29, 1982, is reported at 693 F.2d 298 and reproduced at page 1a of the Appendix to the Petition.

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was entered on November 29, 1982. (PA -2b)[1] A petition for rehearing and for rehearing *en banc* was denied on December 23, 1982. (PA -1c) The Petition for a Writ of Certiorari was filed with this Court on March 11, 1983 and an order granting said petition was entered on May 16, 1983.

Applicable Statute

Section 6501 of the Internal Revenue Code of 1954, as amended, provides in pertinent part:

> "§6501(a) GENERAL RULE—Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3

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[1] Parenthetical references (PA -) are to the Appendix filed as part of Petitioner's Petition for a Writ of Certiorari. Parenthetical references (JA -) are to the Joint Appendix filed in this matter.

years after the return was filed (whether or not such return was filed on or after the date prescribed) * * * and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period."

* * *

(c) EXCEPTIONS—

(1) FALSE RETURN—In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(2) WILLFUL ATTEMPT TO EVADE TAX—In case of a willful attempt in any manner to defeat or evade tax imposed by this title (other than tax imposed by sub-title A or B), the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment at any time.

(3) NO RETURN—In the case of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time."

Statement of the Case

A. Nature of the case.

The petitioner Deleet Merchandising Corp. (hereinafter sometimes referred to as the "Taxpayer"), is a New Jersey corporation. The respondent is the United States of America (hereinafter referred to as the "Government"). The Taxpayer timely filed its corporate tax return for

calendar years 1967 and 1968. On August 9, 1973, Petitioner voluntarily filed amended returns for those years. (JA -55a-56a) On December 21, 1979 (more than 6 years subsequent to the filing of Taxpayer's amended returns), the Internal Revenue Service issued a Notice of Deficiency (JA -71a). The issue to be resolved is whether Petitioner's filing of honest and complete amended tax returns in 1973 commenced the running of the three year statute of limitations of Internal Revenue Code Section 6501 (a), 26 U.S.C. §6501(a).

B. Procedural history.

On January 4, 1980, after paying the amounts assessed by the Government, Petitioner commenced this action by filing its Complaint in the United States District Court for the District of New Jersey. The complaint alleged that the Government erroneously and illegally assessed corporate income taxes and penalties totalling $38,604.00 for 1967 and $75,589.93 for 1968, and demanded judgment in those amounts, with interest as provided by law. (JA -44a-47a) On March 21, 1980, the Government filed its Answer, which denied that the assessments were erroneous or illegal. (JA -49a-51a)

On December 14, 1981, the Petitioner moved pursuant to Rule 56 of the Federal Rules of Civil Procedure for Summary Judgment, on the ground that the assessment of tax by the Government was time barred under the three year limitation in Subsection 6501(a) of the Code. (JA -52a)[2] The Government opposed on the ground that notwithstanding the filing of complete amended returns,

[2] All references herein to "Code" are references to the Internal Revenue Code of 1954, as amended, unless otherwise stated.

the allegedly fraudulent nature of the original returns entitled it to make its assessment without regard to any period of limitation.[3]

By opinion and order dated and entered December 22, 1981, the District Court (Fisher, Chief Judge) granted Summary Judgment in favor of the Petitioner, holding that the Petitioner's filing in 1973 of complete, accurate and nonfraudulent amended income tax returns for the years 1967 and 1968 commenced the running of the three-year limitations period provided in Subsection 6501(a) of the Code. (Reported at 535 F.Supp. 402 (1982) (PA -1d))

On February 18, 1982, the Government filed its Notice of Appeal to the United States Court of Appeals for the Third Circuit. (JA -79a) On November 29, 1982, a divided Court of Appeals reversed the District Court. The majority held that under the literal terms of Subsection 6501(c)(1) the Government had a right in perpetuity to assess taxes and deficiencies against the Petitioner. (Reported at 693 F.2d 298 (3d Cir. 1982) (PA -1a)). Petitioner's petition for rehearing and rehearing *en banc* was denied by the Court of Appeals on December 23, 1982. (PA -1c)

On March 11, 1983, the Petitioner filed a Petition for a Writ of Certiorari with this Court which was granted by order entered on May 16, 1983.

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[3] The Government's allegation that the original returns were fraudulent has never been adjudicated The District Court noted that the fraudulent or nonfraudulent nature of those returns was irrelevant and had no bearing on the legal issue presented. (PA -5d)

C. Relevant facts.

There are no disputed facts in this case and the issue to be determined is exclusively one of law.[4]

It is agreed that Petitioner timely filed its corporate income tax returns for the years ending December 31, 1967 and December 31, 1968 (the "original returns") and paid the taxes shown to be due. (PA -4a)

On August 9, 1973 the Taxpayer, at a time when it was not subject to any criminal or civil investigation by the Government, filed amended tax returns for the tax years 1967 and 1968 (the "amended returns"). (JA -54a, 56a) The amended returns were accepted for filing by the Government and were completely accurate. (JA -76a) The amended returns show a refund due to Taxpayer of $6,206.00 for 1967 and an additional tax of $36,314.01 for 1968. (JA -57a-70a, 71a)

On December 14, 1979, more than six years after the amended returns were filed, the Government issued a Notice of Deficiency. (JA -71a) The Notice of Deficiency, which was based upon the information provided by Taxpayer in the amended returns, disallowed Taxpayer's 1967 refund claim and assessed a deficiency of $25,248.00 and penalties of $13,356.00 for that year. With respect to 1968 the Notice of Deficiency assessed $36,314.01 as additional tax and penalties of $39,275.82. (JA -71a) On or about December 27, 1979, the Taxpayer paid the deficiencies and penalties assessed. (JA -55a)

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[4] The Government submitted no affidavits or documentation to the District Court in opposition to the Petitioner's Motion for Summary Judgment. Thus, all facts set forth in the Petitioner's affidavit submitted in the District Court must be accepted as true.

Summary of Argument

The statute of limitations set forth in Subsection 6501(a) of the Code bars the assessment or collection of any tax deficiencies from Taxpayer for the taxable years 1967 and 1968. Assuming *arguendo* that Taxpayer's original returns for those years were fraudulent, the subsequent filing by Taxpayer in 1973 of complete and honest amended returns for those tax years commenced the running of the three-year limitations period. The purpose underlying the enactment of statutes of limitations generally, and Section 6501 specifically, offers no other conclusion. Once a taxpayer has placed into the hands of the tax authorities the accurate information necessary to enable the Government to properly make an assessment, that taxpayer is entitled to the repose afforded by the statute of limitations enacted by Congress for that very purpose.

The Government has consented to and acknowledged that a taxpayer who fraudulently fails to file a return may nevertheless commence the limitations period under Section 6501(a) by subsequently filing a nonfraudulent "delinquent" return. No real distinction exists between that situation and the initial filing of a fraudulent return which is subsequently followed by the filing of an honest amended return.

The attempt by the Government to draw a distinction, for limitations purposes, between "amended" returns and "delinquent" returns is unfounded. Each such return is an embodiment of the taxpayer's attempt to rectify an earlier transgression. In each instance the taxpayer is correcting earlier acts, which are insufficient to commence any period of limitation with respect to the Government's power to assess. The Government nevertheless continues to attempt to draw such a distinction by resorting to the

most technical of arguments. The argument advanced by the Government in opposition ignores the true nature of the taxpayer's subsequent voluntary filing and attempts to diminish the corrective nature of this act by elevating form over substance. Thus, its argument that "amended" returns are not authorized by statute ignores the fact that such amended returns are not only encouraged by the Government but are submitted on the very form supplied by the Government.

Petitioner urges that the statute under consideration be interpreted in accordance with its intended purpose. Subsection 6501(a) is a general statute of limitations. Subsection 6501(c) sets forth exceptions to the general rule, and is therefore not in and of itself a statute of limitations. Thus, when the taxpayer files either a "delinquent" or honest "amended" return, the exceptions embodied in Subsection 6501(c) are no longer operative and the limitation period begins to run. In sharp contrast, the Government advocates a most tortured construction which would grant priority to an exception at the expense of the statutory general rule.

The Government submits that the voluntary filing of an amended return by a contrite taxpayer does not deprive the Government of its rights to assess the tax in perpetuity. This contention is not only unfair to the individual taxpayer, but is also not in the Government's best interests, for it dissuades the individual taxpayer from re-evaluating his prior acts and coming forth and voluntarily filing an amended return and paying the additional tax that may be due. Further, the Government would have this Court establish one rule for those taxpayers who seek to evade payment of their tax by failing to file a return, and a separate and far more oner-

ous rule for those who file fraudulent returns and subsequently file honest amended returns. Taxpayer submits that this would result in giving preferential treatment to one form of tax fraud over another.

The alleged policy considerations based upon bureaucratic difficulties urged by the Government are without the benefit of legislative imprimatur, in specific instances have no relationship to the facts in this case and do not justify the relief the Government requests. The position Taxpayer advocates is fair and reasonable and the equity underlying Taxpayer's position is apparent. Certainly, all taxpayers who have voluntarily discharged their reporting obligations should be accorded the equal treatment that Congress intended.

For the above stated reasons the decision of the United States Court of Appeals for the Third Circuit should be reversed and the judgment of the United States District Court for the District of New Jersey in favor of the Petitioner should be reinstated and affirmed.

LEGAL ARGUMENT

I. The underlying purpose of Section 6501 dictates that the limitations period commenced upon the filing of an honest and complete amended return.

This case rests entirely on the meaning and operation of a statute of limitations—specifically whether Subsection 6501(a) of the Code bars the assessment and collection of tax deficiencies more than three years after a taxpayer filed complete and honest amended tax returns. Subsection 6501(a) limits the period during which the Government may assess or institute an action to collect tax without assessment, to "3 years after the return was filed (whether or not such return was filed on or after the date prescribed.)"

Subsection 6501(a), which is the general rule, is augmented by several exceptions contained in Subsection 6501 (c). This dispute focuses on the operation of the exception set forth in Subsection 6501(c)(1) which provides "[i]n the case of a false or fraudulent return with the intent to evade tax, a proceeding in court for collection of such tax may be begun without assessment, at any time." The Government contends that this provision is controlling and that the filing of false or fraudulent original returns entitles it to an infinite period in which to assess, no matter what remedial steps the taxpayer undertakes.

On August 9, 1973, the Taxpayer voluntarily and at a time when it was not the subject of either a civil or criminal investigation by the Government (JA -56a) filed amended returns for the years 1967 and 1968. For purposes of these proceedings it has been assumed that the original returns filed by Taxpayer for the years 1967 and 1968 fell within the terms of Subsection 6501(c)(1) so that the statute of limitations contained in Subsection 6501 (a) did not begin running when those returns were filed.

The amended returns filed in August of 1973 were honestly made and corrected any errors (fraudulent or otherwise) in the original returns. The Government accepted Taxpayer's amended returns and the Taxpayer's remittance accompanying the returns but did not seek to assess or otherwise collect tax deficiencies until more than six years after Taxpayer filed the amended returns (JA -54a-55a). Petitioner submits that the three-year limitations period established by Subsection 6501(a) commenced to run when Petitioner provided the Government with complete, correct and accurate information as to the taxable events that occurred in 1967 and 1968, and thereby removed the bar previously imposed by the statutory exception of Subsection 6501(c)(1).

While the statutory exception in the instant case is Subsection 6501(c)(1), there is another relevant exception to the general rule enunciated in Subsection 6501(a). This other exception is significant since its interpretation sheds light on the purpose of the entire statutory scheme. This most important other exception is Subsection 6501(c)(3), which is directed at the failure to file a return. As is the case with the filing of a false or fraudulent return, when a taxpayer fails to file any return the Government is without the benefit of accurate facts relating to a taxpayer's income and expenses. Subsection 6501(c)(3) therefore provides in language that duplicates the exception of Subsection 6501(c)(1) that "[i]n the case of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time."

Petitioner submits that just as the operative language of Subsections 6501(c)(1) and (c)(3) is identical, the purpose of the subsections is also identical and they should be interpreted consistently with one another and with the

purpose underlying statutes of limitation generally. Once a taxpayer has provided the information upon which the Government may make a knowledgeable assessment, the justification for suspending the limitations period is no longer viable and must yield to the favored policy of limiting the Government's time to proceed against the taxpayer. *Dowell* v. *Commissioner*, 614 F.2d 1263 (10th Cir. 1980); *Britton* v. *United States*, 532 F.Supp. 275 (D.Vt. 1981), *aff'd without opinion* (2d Cir. No. 816246, April 15, 1982); *Bennett* v. *Commissioner*, 30 T.C. 114, (1958), *acq.*, 1958-2 C.B. 3.

As this Court has stated, the major purpose of a statute of limitations is to:

> "assure fairness to defendants. Such statutes 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Burnett* v. *New York Central R. Co.*, 380 U.S. 424, 428 (1965). *See also, Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, 348-349 (1944); *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 561 (1974) (concurring opinion).

Moreover, it has long been established that:

> Statutes of limitations are founded on sound policy. They are statutes of repose and should not be evaded by a forced construction. *Pillow* v. *Roberts*, 13 How. 472, 477 (1851). *See also, Clementson* v. *Williams*, 8 Cranch 72, 74 (1814).

The very same considerations of fairness led Congress to limit the period of time in which the Government may assess federal tax deficiencies. There has been no

manifestation of a Congressional policy in favor of an unlimited assessment period. *Bennett* v. *Commissioner*, 30 T.C. 114, 123-24 (1958), *acq.*, 1958-2 C.B. 3. Congress has determined that a taxpayer who has furnished the Government with a complete and honest return is entitled to repose after a finite period. After that period has elapsed, the taxpayer is assured that his tax liability cannot be reopened. *Germantown Trust Co.* v. *Commissioner*, 309 U.S. 304 (1940); *Mabel Elevator Co.* v. *Commissioner*, 2 B.T.A. 517, 519 (1925), *acq.*, VI-1 C.B. 4.

Just as Congress has granted to the taxpayer a limitations period based on sound principles of fairness, it has balanced that policy by affording the Government protection from taxpayer abuse. This is accomplished by depriving the errant taxpayer of the repose of the limitation period ordinarily granted when the taxpayer has deliberately failed to provide the information which would enable the tax authorities to detect errors and misstatements in taxpayer's return within the allotted period. Thus, the period of limitations enacted in Subsection 6501(a) of the Code is wholly suspended in the three circumstances set forth in Subsections 6501(c)(1), (c)(2) and (c)(3).[5]

Each exception contemplates conduct on the part of the taxpayer which deprives the Government of the accurate information necessary to determine the tax, either because the taxpayer did not file his return or filed a return in which the information was false and fraudulent. *See, e.g., Klemp* v. *Commissioner*, 77 T.C.

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[5] Subsection 6501(c)(2) permits the Government to assess at any time in the event of "a willful attempt in any manner to defeat or evade tax." By its terms, however, this exception is not applicable to the income tax.

201, 205-206 (1981) (reviewed by the entire court), *appeal docketed*, No. 81-7744 (9th Cir.); *Bennett* v. *Commissioner; Colony, Inc.* v. *Commissioner*, 357 U.S. 28, 36 (1958).

The soundness of such an approach cannot be seriously contested. There exists no constitutional right to a statute of limitations. The enactment of such a statute is solely within the discretion of the legislature. Having successively enacted statutes of limitation in every Internal Revenue Code since 1921, Congress supplemented that general legislation on each occasion by additionally providing that no limitations period shall commence in the case of a taxpayer who filed a return that was intentionally false and misleading or who failed to file a return.[6] It is not a question of whether a statute of limitations has been tolled. Rather, Congress has decreed that the statute of limitations does not even start for that period during which the taxpayer has failed to provide the Government with accurate information.

The Government contends that the suspension of time provided in Subsection 6501(c)(1) lasts forever (or at least until the Internal Revenue Service makes an assessment). That construction is not only unfair to the individual taxpayer, but shortsighted in terms of the Government's own interest, in that it would dissuade taxpayers from voluntarily coming forth and filing amended returns. Petitioner submits, however, that Subsection 6501

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[6] *See* Sections 275 and 276 of the Internal Revenue Code as restated by Sections 277 and 278 of the Revenue Act of 1924; Sections 277 and 278 of the Revenue Act of 1926; Sections 275 and 276 of the Revenue Act of 1928; Sections 275 and 276 of the Revenue Act of 1932; Sections 275 and 276 of the Revenue Act of 1934; Sections 275 and 276 of the Revenue Act of 1936; Sections 275 and 276 of the Revenue Act of 1938. *See also* Sections 275 and 276 of the Internal Revenue Code of 1939 and Section 6501 of the Internal Revenue Code of 1954.

(c)(1) should be construed according to its purpose, i.e., to deny to the taxpayer the benefits of a statute of repose for that period during which he has failed to discharge his legal obligation of providing the Government with a complete and accurate statement of his income, deductions and credits.

As Justice Brandeis stated in *Florsheim Bros. Drygoods Co.* v. *United States*, 280 U.S. 453 (1930):

> "The burden of supplying by the return the information on which assessments were based was thus imposed upon the taxpayer. And, in providing that the period of limitations should begin on the date when the return was filed, rather than when it was due, the statute plainly manifested a purpose that the period was to commence only when the taxpayer had supplied this information in the prescribed manner." 280 U.S. at 460

The purpose of the Congressional enactment of exceptions to Subsection 6501(a) is consistent with the decision in *Florsheim Bros.* Until the taxpayer has discharged his obligation under law to provide the Government with a complete and accurate statement of his income and expenses, the Government's right to contest the taxpayer's calculations does not become subject to a limitations period. The bar to the Government's right to assess the taxpayer is indefinitely held in suspense, or as stated in the operative language of Subsections 6501(c)(1) and (3), the Government may assess or seek to collect the tax it claims due *"at any time."* When, however, the taxpayer does discharge his obligation by supplying the Government with the required information the limitations period begins running. As stated in *Bennett* v. *Commissioner:*

> "For, once a nonfraudulent return is filed, putting the Commissioner on notice of a taxpayer's receipts and deductions, there can be no policy in favor of permitting assessment thereafter at any time without limitation. We think that the statute of limitations begins to run with the filing of such returns." 30 T.C. at 123-24.

When, as in the instant case, the taxpayer files an honest return, be it amended or original, the Government has available to it all of the information that is required to allow it to assert its claim for any unpaid tax. Once the taxpayer has placed that information in the Government's hands, the justification for continuing the suspension of the limitations period loses its vitality, unless it can be shown that Congress intended the suspension of the limitation period as a punitive measure.

That suggestion was considered and rejected in *Klemp* v. *Commissioner; Dowell* v. *Commissioner; Britton* v. *United States; Bennett* v. *Commissioner.* Where Congress intended to impose punitive measures in the Code it has affirmatively done so in clear and precise language. Thus, in enacting Subsection 6653(b) of the Code, Congress imposed a 50% additional fraud penalty on the difference between the true tax liability and the amount shown on the original return. The taxpayer is subject to this fraud penalty upon the filing of a fraudulent return regardless of the filing of amended returns, provided the same is assessed within the statutory period. *See, e.g., George M. Still Inc.* v. *Commissioner,* 19 T.C. 1072, *aff'd.,* 218 F.2d 639 (2d Cir. 1955); *Eck* v. *Commissioner,* 16 T.C. 511 (1951), *aff'd.,* 202 F.2d 750 (2d Cir. 1953), *cert. denied,* 346 U.S. 822 (1953). Similarly, the criminal provisions of the Code are obviously punitive in nature and subject a taxpayer who has committed fraud to severe

sanctions whether or not he chooses to file an amended return, provided the Government has acted within the six year period of limitations. *See,* 26 U.S.C. §7201 *et seq.*

Any possible doubt concerning the non-punitive nature of Subsection 6501(c) is resolved by the fact that the suspension of the limitations period for a taxpayer who willfully and with intent to evade the tax fails to file a return terminates when the taxpayer files an honest return, even if that honest return is filed after commencement of a tax audit by the Government. *Bennett* v. *Commissioner.* It is undisputed that under such circumstances filing of the amended return results in the commencement of a period of limitations provided in Subsection 6501(a). *Bennett* v. *Commissioner.*

It is inconceivable that Congress would utilize the suspension of the statute of limitations as a punitive measure for persons who file a false or fraudulent return but not for persons who fraudulently attempt to evade the payment of tax by willfully failing to file any return at all. The distinction which the Government attempts to create between Subsections 6501(c)(1) and (c)(3) simply does not manifest itself in the legislative history.

From 1921 until the adoption of the 1954 Code the substance of those two subdivisions was included in one sentence of a single subsection of the income tax laws.[7]

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[7] *See, e.g.,* Section 276(a) of the Code which reads as follows:

> "In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time"

The Committee Reports to the 1954 Code discuss the substantive changes to the 1939 Code provisions that were included in Section 6501 of the 1954 Code. S.Rept. No. 1622, 83d Cong., 2d Sess. 583-585 (June 18, 1954); H.R. Rept. No. 1337, 83d Cong., 2d Sess., A413-A414 (March 9, 1954). No mention is made in those Reports of the separation into two subdivisions of the "failure to file" exception and the "false or fraudulent return" exception. Surely the illusory distinction which the Government must press to support its position would have been commented upon by either the House or Senate at the time that this apparent clerical change had been enacted, had such a change been as significant as the Government erroneously contends. The absence of such commentary in the legislative reports is strong evidence that the separation was solely stylistic and was intended to make no substantive change in the law.

That Subsections 6501(c)(1) and 6501(c)(3) are in *pari materia* and are therefore to be read with reference to each other is not truly an issue. *See Dowell* v. *Commissioner*. Even the opinion of the Third Circuit Court of Appeals, where the majority declined to follow the holding in *Dowell* agreed that the "failure to file" exception and the "false or fraudulent return" exception are in *pari materia*. *Badaracco* v. *Commissioner*, 693 F. 2d 298, 301, n.6. The stated basis for the Third Circuit's departure from the reasoning of *Dowell* is the parenthetical phrase contained in Section 6501(a): "(whether or not such return was filed on or after the date prescribed)." The majority opinion concluded that the addition of that phrase in the 1954 Code indicated a Congressional intent to treat differently taxpayers who failed to file and those who filed fraudulent returns. Petitioner respectfully submits that such a conclusion is unwarranted.

As is the case of the separation of former Section 276(a) of the 1939 Code into two separate subsections, the pertinent legislative history makes no mention whatsoever of the purpose underlying the insertion into Subsection 6501(a) of the parenthetical phrase. In fact, no such commentary was necessary since the courts, even prior to enactment of the 1954 Code, consistently held that the limitations period set forth in the predecessor statutes to Subsection 6501(a) commenced running on the date when by law the return should have been filed or from the date when the return was actually filed, whichever is later. *See, e.g., Automobile Club* v. *Commissioner*, 353 U.S. 180 (1957) (returns filed on October 22, 1945 for 1943 and 1944 commenced period of limitations on filing date); *Helvering* v. *Campbell*, 139 F.2d 865 (4th Cir. 1944).

If Congress had intended the result espoused by the majority of the Third Circuit, they would have so stated. Moreover, if Subsection 6501(a) was meant to deal with the exception relating to a failure to file, there would have been no need to re-enact Subsection 6501(c)(3). Thus, to accept the reading of the statute espoused by the Court below would violate a basic maxim of statutory construction which presumes that every provision of a statute is intended for some useful purpose and a statute should not be read to render certain provisions superfluous. *United States* v. *Marubeni American Corp.*, 611 F.2d 763 (9th Cir. 1980); *United States* v. *Wong Kim Bo*, 472 F.2d 720 (5th Cir. 1972). It is clear that the parenthetical reference in Subsection 6501(a) was intended to assist the reader in ascertaining the meaning of that section and not to evince a different treatment of those taxpayers who failed to file (Subsection 6501(c)(3)) and those who filed a false or fraudulent return (Subsection 6501(c)(1)).

Moreover, the practical result of incorporating into the parenthetical phrase of Subsection 6501(a) the interpretation adopted by the Third Circuit in *Badaracco* v. *Commissioner* is excessively drastic. For, under the law as espoused by the Court below, a taxpayer who attempts to evade the tax by fraudulently failing to file a return can terminate the suspension of the limitations period by filing a return at a later date, even if that later date is after indictment and conviction for criminal violation of the tax law. But if the attempt to evade tax was effected by filing a false return, the taxpayer can never terminate the suspension of that period by filing an amended return or by any other means, even if he repents and files an amended return at a time when the Government has no indication whatsoever that there has been wrongful conduct on the part of the taxpayer.

The legal issue presented by this comparison is not whether it is desirable to permit wayward taxpayers to terminate the suspension period—there is no dispute that a suspension caused by Subsection 6501(c)(3) can be so terminated. Rather, the narrow question presented is whether Congress is likely to have intentionally provided such disparate consequences to acts which are distinguishable only by a factual difference that has no substantive relevance. The 33-year parallel history of the two suspension provisions as integrated parts of a single statutory sentence makes it clear that the Congressional intent is contrary to the construction urged by the Government.

Faced with its own acquiescence in the logic of the opinion in *Bennett* v. *Commissioner*, and the fact that there is really no substantive difference between a failure to file and the filing of a false or fraudulent return, the Government argued to the courts below that there exists a distinction between an honest but "delinquent" return and an honest "amended" return.

The linchpin for this argument is that there is no statutory authority for the filing of an amended return. Such a proposition is without merit and amounts to a major exaltation of form over substance. While it is true that Congress has never fully provided statutory authority for the filing of amended returns, it cannot be seriously contended that amended returns are not an integral part of the procedures established by the Government for the reporting and payment of taxes.[8]

It is not only the Government which has accepted and in fact embraced the concept of the amended return. The courts have consistently treated such documents as part of the nation's tax structure to an extent that it may be fairly stated that a body of common law has developed surrounding their use. *See, e.g., National Refining Co. of Ohio,* 1 B.T.A. 236 (1924), *non-acq.,* IV-1 C.B. 4; *John P. Alkire Inv. Co.* v. *Nicholas,* 114 F.2d 607 (10th Cir. 1940); *Kaltreider Construction Inc.* v. *Commissioner,* 129 F.Supp. 228 (D. Pa. 1961). Moreover, amended returns have even been used by the Government as the basis for prosecution of criminal charges. *Neaderland* v. *Commissioner,* 52 T.C. 532 (1969).

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[8] For example, *see* Treas. Reg §§ 301.6211-1(a) [taking the tax shown on the amended return into account in determining the amount of tax deficiency], 301.6402-3(a) [requiring a claim for refund to be made by filing an amended return], 1.1034-1 (i)(2) [requiring the filing of an amended return to show the amount of gain recognized on the sale of a residence where the taxpayer fails to reinvest all of the proceeds of sale to purchase a replacement residence], 1.453-8(d)(3) [permitting the use of an amended return to revoke an election to report income on the installment method]. *See also,* Rev. Rul. 82-81, 1982-1 C.B. 109; Rev. Proc. 79-13, 1979-1 C.B. 494. The Commissioner provides printed forms for amended returns (Form 1040X for individuals and Form 1120X for corporations).

The only distinction between an "amended" return and a "delinquent" return as it relates to the issue at bar is the label which the Government puts on it. In each instance, the document represents the taxpayer's honest effort to rectify an earlier fraudulent attempt to evade the tax. The information contained in each return is of the same nature and in each instance it is the means by which the taxpayer has sought to supply the Government with the information necessary to enable a proper assessment to be made of the taxes due.[9]

The weakness of the Government's position with respect to the distinction between "amended" and "delinquent" returns can be illustrated by the following hypothetical situation: Mr. B files a fraudulent return on April 15 (a Friday). Over the weekend he has a change of heart and files an honest "*amended*" return on the following Monday, April 18. According to the Government, since the document Mr. B has filed on April 18th is to be classified as an "amended" return, the statute of limitations for the assessment and collection of the tax which may be due thereunder never commences. On the other hand, if Mr. B, with the same intent to evade tax, decides on April 15th not to file a return and thereafter had the same change of heart, his filing on April 18th of what the Government chooses to classify as a "*delinquent*" return would entitle him to the benefit of the three year limitations period. The proposition is so patently illogical as to defeat itself. As Judge Wilbur noted in *Klemp* v. *Commissioner:*

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[9] It is conceded that in the instant case, the Government accepted Petitioner's amended returns when filed by Petitioner in August 1973 (JA -76a).

> "Respondent would leave the statute open for that portion of eternity concurrent with the taxpayer's life, whether he lives three score and ten or as long as Methuselah. In most religions one can repent and be saved but in the peculiar tax theology of respondent no act of contrition will suffice to prevent the statute from running in perpetuity. Merely to state the proposition is to refute it, unless some very compelling reason of policy requires visiting this absurdity on the taxpayer." *Klemp*, 77 T.C. 201, 207 (concurring opinion).

Indeed, the effect of the Government's absurd proposition is not limited to the length of Mr. B's mortal existence. Under Subsection 6901(c)(1) of the Code, the Government can assess a liability against a transferee of Mr. B within 1 year after the expiration of the period of limitation for assessment against the transferor (Mr. B). Since, according to the Government's contention, there is no expiration of its power to assess against Mr. B, the one-year expiration period for assessing against his transferee will never commence to run. *See, Leo Kubik, Transferee*, 33 T.C.M. 302 (1974). Consequently, even years after Mr. B's death, the Government would not be barred from litigating such issues with the beneficiaries of B's estate or with the legatees of deceased beneficiaries. Such a result cannot be endorsed or sanctioned by this Court unless there exists the most explicit statement of Congressional policy dictating such a conclusion. No such statement of Congressional intent exists either in the legislative history or in the language of the statute itself. Therefore, the Government's contention that there exists a valid distinction between Subsections 6501(c)(1) and 6501(c)(3) for purpose of assessment must be rejected.

II. The language of Section 6501 expresses Congress' intent that the exception in Subsection 6501(c)(1) is applicable only so long as a false return is the only return filed, and that the three year limitation in Subsection 6501(a) commences upon the filing of an honest return.

The Third Circuit Court of Appeals found that Subsection 6501(c)(1) was, in essence, an unlimited statute of limitations. This contradiction in terms resulted from undue attention to three words in Subsection 6501(c)(1) —"at any time"—and a forced application of the "plain meaning" rule of statutory construction. The Court's attention did not focus on the plain meaning of the language employed in the remainder of Section 6501, nor the underlying intent of the statute.

Subsection 6501(c)(1) states:

> "In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, *at any time*."

Taken literally, and without any reference to the remainder of the section, this subsection *may* be read as meaning that once the taxpayer has filed a fraudulent return there can never be a time limit for the Government to assess tax. However, a reading of the entire statute belies such an interpretation. Of course, the parallel subdivision, 6501(c)(3), contains the very same plain language—"at any time". Yet that very same language has been construed by the Tax Court to mean something entirely different and that construction was acquiesced in by the Government. *Bennett* v. *Commissioner*. Undaunted by the undeniable inconsistency of

its two positions, the Government presses a strained and unrealistic reading of Subsection 6501(c)(1).

The plain-meaning rule is in marked contrast to the controlling rule of construction that a statute must be interpreted according to its purpose, even if that requires the addition, deletion or substitution of language.[10] While many cases can be found where the plain meaning rule of construction is employed, more recent decisions of this Court have given greater weight and acceptance to the latter rule. *See e.g., Rose* v. *Lundy*, 455 U.S. 509, 516-518 (1982); *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600 (1979). In *Chapman* the Court stated "[a]s in all cases of statutory construction, our task is to interpret the words of these statutes in light of the purposes Congress sought to serve." 441 U.S. at 608. In *Watt* v. *Alaska*, 451 U.S. 259 (1981), this Court recognized that any conflict between the two rules of construction must be resolved in favor of effecting Congressional intent notwithstanding the use of words which cause a contrary result when construed literally:

> "the plain-meaning rule is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists . . . The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect." 451 U.S. at 266.

Even the zealous adherents to a "plain-meaning" rule are likely to agree that the plain language cannot control if it leads to a result that Congress did not intend.

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[10] *Qui Haeret in Litera Haeret In Cortice* ("He who considers merely the letter of an instrument goes but skin deep into its meaning") Black's Law Dictionary 5th Ed. 1979.

While the plain-meaning approach in the instant case does not result in the height of absurdity related by Blackstone in his Commentaries,[11] a strict adherence to that doctrine can result in patent inconsistencies, the principal one being the disparity in treatment of taxpayers who fraudulently fail to file a return and taxpayers who file a fraudulent return. *Compare Bennett* v. *Commissioner with Badaracco* v. *Commissioner.* Moreover, such construction permits the Government to forever suspend a Sword of Damocles over a taxpayer who at one time may have filed a fraudulent return, but who has subsequently recanted and filed an amended return providing the Government with all the information necessary to properly assess the tax. No reasoned rule of law can justify this unbridled delay of the commencement of the statute of limitations, nor support a legal theory that in practice punishes a taxpayer, like the taxpayer herein, who recants prior acts of alleged misconduct, and voluntarily comes forth and provides the Government with the information it needs to assess any tax due.

The Taxpayer allegedly filed false tax returns. As a corporation its management was subject to change, and after the filing of allegedly false returns, management sought to voluntarily rectify the situation by filing amend-

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[11] To take a time-honored example, consider the construction of a law adopted in Bologna, Italy a few hundred years ago "that whoever drew blood in the streets should be punished with the utmost severity". A question arose as to whether the law called for the punishment of a surgeon who opened a vein of a person who had fallen down in the street in a fit. The literal or plain terms of the statute clearly applied to the surgeon's actions, but the language of the statute, when read in light of common experience, strongly suggests that it was not aimed at medical treatment provided by a surgeon. The statute was deemed not to apply. *See Blackstone's Commentaries,* Vol. 1, p. 61 (8th ed. 1778).

ed returns. Taxpayer acted voluntarily and without any coercion from the Government whatsoever. Taxpayer was not the subject of any criminal investigation, and there was no reason to believe that it would be indicted for criminal tax fraud.[12] (JA -56a) Taxpayer's filing of the amended returns was a voluntary act undertaken to rectify past errors in judgment. To subject the Taxpayer, or any other taxpayer who voluntarily comes forth and files an amended tax return, to open ended liability cannot have been intended by Congress. The Congressional intent is clear that once the Government is given the information it needs to determine the taxes, some reasonable period of limitation for the assessment of that tax must be imposed. That reasonable period of limitations—three years—was the one selected by Congress in Subsection 6501(a). This Congressional intent has been held to dictate that the three year statute is applicable to the taxpayer who, having fradulently failed to file, comes forth (voluntarily or otherwise) and files a tax return which provides the government with information it needs to assess the tax. *Bennett* v. *Commissioner*. There is no reason to assume that Congress intended inconsistent application of this statute as between fraudulent nonfilers, who recant and file delinquent returns, and fradulent filers, who recant and file amended returns.

The inconsistency of treatment urged by the Government cannot be shrugged off as merely a peculiarity of statutory law. Such an explanation may be accepted only if there is clear evidence that Congress intended such result. As noted previously, the legislative history relative to Subsection 6501(c) is completely silent. Appar-

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[12] At the time Taxpayer filed its amended returns, any claim of criminal wrongdoing for the tax year 1966 had been barred by the six year statute of limitations applicable to criminal misconduct, and the statute was about to run on tax year 1967. See Subsection 6531(a) of the Code.

ently the effect of the filing of an amended nonfraudulent return on the period of limitation is a matter which Congress did not anticipate and which it never addressed. These circumstances, which are not uncommon, require an examination of the policies underlying the enactment. As this Court stated in *Rose* v. *Lundy*:

> "In 1948, Congress codified the exhaustion doctrine in 28 U.S.C. Section 2254, citing *Ex parte Hawk* as correctly stating the principle of exhaustion. Section 2254, however, does not directly address the problem of mixed petitions. To be sure, the provision states that a remedy is not exhausted if there exists a state procedure to raise 'the question presented', but we believe this phrase to be too ambiguous to sustain the conclusion that Congress intended to either permit or prohibit review of mixed petitions. Because the legislative history of Section 2254, as well as the pre-1948 cases, contains no reference to the problem of mixed petitions, in all likelihood Congress never thought of the problem. Consequently, we must analyze the policies underlying the statutory provision to determine its proper scope. *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975) ('In expounding a statute, we must . . . look to the provisions of the whole law, and to its object and policy' (citations omitted)); *United States* v. *Bacto-Unidisk*, 394 U.S. 784, 799 (1969) ('where the statute's language seem[s] insufficiently precise, the 'natural way' to draw the line 'is in light of the statutory purpose' (citations omitted)); *United States* v. *Sisson*, 399 U.S. 267, 297-298 (1970) ('The axiom that courts should endeavor to give statutory language that meaning that nurtures the policies underlying legislation is one that guides us when circumstances

> not plainly covered by the terms of a statute are subsumed by the underlying policies to which Congress was committed'); *Unexcelled Chemical Corp.* v. *United States*, 345 U.S. 59, 64 (1953) ('Arguments of policy are relevant when for example a statute has an hiatus that must be filled or there are ambiguities in the legislative language that must be resolved.')." 455 U.S. at 516-18.

The policies underlying Section 6501 dictate against acceptance of an overly literal reading of Subsection 6501 (c)(1). Moreover, in this case there is no conflict between the plain meaning rule and a construction which relies on Congressional intent. For a reading of all of the language of Section 6501 reveals that Subsection 6501 (c)(1) is only an exception to the three-year limitation made generally applicable by subsection 6501 (a). In fact, all of Subsection 6501(c) is denominated in the body of the statute as "EXCEPTIONS—" to Subsection 6501(a). Thus, Subsection 6501(c)(1) is clearly not, as the Government would have this Court concluded, a self-contained statute of limitations, whose meaning can be ascertained from a reading of the Subsection without consideration of the plain meaning of the entire section. Rather, it is exactly what the plain language of the statute says it is, an "*exception*" to the limitation period provided in Subsection 6501(a).

Subsection 6501(c)(1) is not a statute of limitations. Congress expressly enacted it as an exception to the statute of limitations in Subsection 6501(a). It is the antithesis of a statute of limitations, which under specified circumstances only postpones the commencement of the three-year limitations period. Subsection 6501(c)(3) is of an identical nature to (c)(1), and for the most part contains identical language. It also is not a statute of lim-

itations, but rather an exception to the statute. As an antithesis of a statute of limitations, Subsection 6501 (c)(3), under circumstances slightly different than those to which (c)(1) must be applied, also only postpones the commencement of the limitation period. Subsection 6501 (c)(3) suspends the period of limitation "in case of failure to file a return". Thus, *so long as* there is a failure of the taxpayer to file a return, the Government may assess the tax "at any time". However, when the delinquent taxpayer files a return (voluntarily or otherwise), the exception to the general limitation period is no longer applicable, and the three year period of limitation begins to run. The Government has so conceded. *Bennett* v. *Commissioner*. Likewise, the exception to the general period of limitation in Subsection 6501(c)(1) is applicable *so long as* the taxpayer has only filed a false or fraudulent return. When the taxpayer files an amended return which reveals his actual income, deductions and credits, the provisions of Subsection 6501(c)(1) cease to be applicable, and the limitation period may no longer be postponed. Thus, under the over-all statutory scheme, once an honest delinquent or an honest amended tax return has been filed, the exceptions in Subsections 6501 (c)(1) and 6501(c)(3) to the general statute of limitations in Subsection 6501(a) cease to apply, and "[t]he tax cannot be assessed at any time under Section 6501(c) of the code, but must be assessed within the three-year period of limitation provided in Section 6501(a)." Rev. Rul. 79-178, 1979-1 C.B. 435.

The Government's so-called plain meaning construction of the language "at any time" is further eroded, when other uses of that very language are analysed. As previously indicated, in its acquiescence in *Bennett* v. *Commissioner* the Government implicitly conceded that "at any time" in Subsection 6501(c)(3) really means *so long as no*

delinquent return is filed. Thus the plain meaning of "at any time" may no longer be viewed as quite so plain.

Similarly, an overly literal construction of the words "at any time" was rejected by the Fifth Circuit in *Wolff* v. *United States*, 578 F2d 1103 (5th Cir. 1978), a case which involved the construction of another closely related subdivision, Subsection 6501(c)(2). That subdivision is yet another exception to 6501(a), and likewise postpones commencement of the running of the three-year statute "[I]n case of a willful attempt . . . to defeat or evade" taxes other than income, gift or estate taxes. In Subsection 6501(c)(2) the tax may also be assessed "*at any time*". This exception is almost identical to Subsection 6501(c)(1), since the (c)(2) requirement of willfulness and the (c)(1) requirement of intent are indistinguishable. In *Wolff* v. *United States* the Fifth Circuit considered the impact of the subsequent dissipation of the taxpayer's demonstrated willfulness, (i.e., intent) to evade tax, which willfulness existed at the time of the original filing. That Court determined that upon a filing of an amended return and a showing that the taxpayer's willful intent to evade tax had ended, the general three-year limitation would once again control. Thus in the case of another exception to Subsection 6501(a), the plain language "*at any time*", was held to really mean "*so long as the willful intent continues*", as demonstrated, for example, by the filing of an amended, nonfraudulent return. Clearly, the Fifth Circuit has recognized that "at any time" must not be given the literal construction urged by the Government herein.

The Government also attempts to justify its position by focusing on the unimportant, if not non-existent, issue of "original" returns as opposed to "amended" returns. The Government argues that once an original return is

filed, the parties' rights and obligations become fixed in stone and an unlimited statute of limitations becomes effective forever. The controlling determination is not whether a return is original or amended, but whether it is a return at all.

Initially, it must be noted that the terms "original" and "amended" do not appear in Section 6501.[13] Thus, when the Government contends that the controlling factor is whether a return is original or amended, it attempts to draw attention to a non-issue, rather than a determination of whether the returns fit within the descriptive terminology employed by the Congress.

In describing the documents which may be filed by a taxpayer, Section 6501 uses only the terms "the return", "false return" and "no return". The language in Subsections 6501(c)(1) and (3) which permits the tax to be assessed "at any time" must not be construed in conjunction with the words "original" and "amended" return,

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[13] In fact, the one provision of the Code which mentions "amendments" to returns, I.R.C. §6213(g)(1) (1976 & Supp. IV 1980) defines "return" for the purposes of §6213 as "any return, statement, schedule, or list, and any amendment or supplement thereto . . ." The legislative history indicates that this definition was included to insure that the Commissioner reviewed all supporting schedules for "mathematical errors" before assessing deficiencies through summary proceedings. *See* H.R. Rep. No. 94-658, 94th Cong., 1st Sess. 289-93 (1975); S. Rep. No. 94-938, 94th Cong., 2d Sess. 375-387 (1976). Therefore nothing in the legislative history indicates that Congress explicitly excluded the acceptance of amended returns by the Internal Revenue Service. *See, e.g.* Treas. Reg. §§301.6211-1(a), .6402-1(a)(5) (1982). When the Government has accepted ameded returns, as in this case, the courts have given them effect. *E.g., United States* v. *Samara*, 643 F2d 701, 704 (10th Cir.) *cert. denied*, 454 U.S. 829 (1981); *Bookwalter* v. *Mayer*, 345 F2d 476, 480 (8th Cir. 1965).

as the Government submits, but rather in conjunction with those phrases which do appear in the statute.

When a taxpayer files a "return", the three-year limitation in Subsection 6501(a) is applicable. It is also quite clear that when the taxpayer files "no return," by operation of Subsection 6501(c)(3), the three-year statute does not commence to run. However, when he thereafter files a "return", the three-year limitation period commences. *Bennett* v. *Commissioner.* The reason for this is not, as the Government contends, that the delinquent return is an "original" return, but because it is a "return" which "evinces an honest and genuine attempt to satisfy the law". *Zellerbach Paper Co.* v. *Helvering,* 293 U.S. 172, 180 (1934). While that case involved circumstances which were distinguishable from those in the case at bar, Justice Cardozo's analysis and decision are particularly instructive, since he recognized that a return is a return for statute of limitations purposes when it evinces an "honest and genuine" endeavor to advise the Government of the taxpayer's true income, deductions, and credits. Concommitantly, when a purported return does not do so, it is a "false" return, *i.e.,* no return at all, for statute of limitations purposes. *See Dowell* v. *Commissioner.*

Reflecting on the language of the other exception to the general three year period of limitation, the "false return" (Subsection 6501(c)(1)), Justice Cardozo's analysis leads to the conclusion that the filing of a "false return" has no effect whatsoever on the period of limitation for assessment. By implication Justice Cardozo advised that a "false return", one which does not evince an honest intent to comply with the law, is no return at all. This is absolutely consistent with Webster's Dictionary, which defines the word "false" as: "counterfeit; not genuine or real; artificial." *Webster's New Twentieth Century Dictionary of the English Language* (Unabridged 2nd Edition (1971). Under

this definition a "false return", as the phrase was used by Congress in Subsection 6501(c)(1), refers to a "*counterfeit*" return; "*not a genuine*" return; "*not a real*" return. Thus, when Congress enacted the "false return" exception to the three-year limitation, it did so in recognition of the fact that, for limitations purposes, a "false return" by its commonly accepted definition is not a return. Likewise, by enacting (c)(1) as an exception to the general rule, Congress evidenced an equally clear intent that the filing of a "return", *i.e.*, an honest return, whether it is called an "original" return, a "delinquent" return or an "amended" return, triggers the three-year limitation period which is applicable to all honest returns.

In sum, the Government's reading of Section 6501 is inherently flawed as it requires for its fundamental validity the elevation of Subsection 6501(c)(1) to the status of a self-contained statute of limitations (albeit an unlimited one) standing separate, apart and different from the remainder of Section 6501. This argument was rejected by the Tenth Circuit in *Dowell*, the Second Circuit in *Britton* and by the entire Tax Court in *Klemp*, and is in direct contradiction with the holding in *Bennett*, and the Government's acquiescence therein. Furthermore, Congress could not have intended that it would make a difference if "the return" under Subsection 6501(a) is an amended return as opposed to a delinquent return; for in either case, the taxpayer who supplies the Government with information that satisfies *Zellerbach* has filed the return contemplated in Subsection 6501(a) and has satisfied the condition precedent for the commencement of the period of limitations. The contrary position espoused by the Government, that a taxpayer who files a fraudulent return forever foregoes the opportunity to file "the return" under Subsection 6501(a), is undermined by the totality of the language of Section 6501 and by the Government's acquiesence in *Bennett* v. *Commissioner*, and should not be accepted by this Court.

III. The policy contentions urged by the Government are unavailing

In its response to the Petition for a Writ of Certiorari and in the lower Courts, the Government pressed certain alleged "policy" considerations in support of its contention that it needed an open-ended assessment period. Two of these arguments focus on the internal mechanisms and procedures of the Internal Revenue Service, and the third such argument was based on Subsection 6501(e)(1) of the Code.

Each such consideration advanced by the Government is superficially attractive but does not withstand careful analysis. Moreover, each assertion of policy suffers from a fatal flaw, for each is as equally applicable to the situation presented in *Bennett* v. *Commissioner*, involving a fraudulent failure to file, as it is to the instant case. While the Government contends that its internal procedures may suffer if the position urged by Taxpayer is upheld by this Court, the Government cannot truly identify a single policy consideration which is persuasive enough to justify so disparate a treatment between the taxpayers in *Bennett* and the Taxpayer in the instant case.

Specifically, the three policy contentions which were cited with approval by the Third Circuit are: (1) the duality of civil and criminal proceedings; (2) the difficulty of proving fraud; and (3) the alleged anomalous treatment of taxpayers who omit substantial income from their returns, as opposed to those who file fraudulent returns. Petitioner shall address each of these *seriatim*.

1) The duality of civil and criminal proceedings.

The Government urges that upon the filing of a fraudulent return, it should be permitted to delay civil assess-

ment for that period of time during which criminal proceedings or investigations are pending (Respondent's Rule 22 Brief pp. 9-10). This policy argument has no application to the Petitioner or to the issues presented by this Petition, as Petitioner was *never* the subject of any criminal proceeding or investigation.

Although it has been previously stated, Petitioner must again point out that it came forward and voluntarily filed its amended returns without any pressure from the Government, prior to *any* action by the Government (JA - 56a).[14] There was no inquiry or investigation into Petitioner's tax returns prior to its voluntary filing of its amended tax return.[15] Petitioner suggests that a taxpayer who voluntarily comes forth and files an amended tax return, in an honest attempt to rectify past errors, should

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[14] In contrast, in *Bennett* v. *Commissioner*, the taxpayers, who intended to fraudulently evade payment of their taxes filed a delinquent return only after commencement of an audit by the Government. In *Dowell* v. *Commissioner*, the taxpayers were subject to criminal investigation before the amended returns were filed and were thereafter convicted under 26 U.S.C. §7206(1) of willfully filing false tax returns. *United States* v. *Dowell*, Cr.No. 70-85 (W.D.Okla., 1970), *aff'd.*, 446 F.2d 145 (10th Cir. 1971), *cert. denied*, 404 U.S. 984 (1971); in *Klemp* v. *Commissioner*, the taxpayers had been notified by the Government prior to the filing of their amended returns that their returns were to be audited. 77 T.C. at 202. Criminal convictions were also obtained against the taxpayers in *Britton* v. *United States*, and in the consolidated companion case to the instant proceeding, *Badaracco* v. *Commissioner*, 693 F2d at 300.

[15] The majority opinion of the Third Circuit in *Badaracco* v. *Commissioner* erroneously states with respect to Petitioner that "lengthy criminal and civil investigations" occurred following Taxpayer's filing of amended returns in August of 1973 (PA -4a). 693 F2d 300. That statement is unfounded and cannot find support in any portion of the record below.

not be subject to never-ending assessment to satisfy the Government's concern with its "policy" relating to the enforcement of the criminal tax statutes, especially when that policy is totally inapplicable to the taxpayer. Further, to afford such a taxpayer harsher treatment than that afforded to the taxpayer in *Bennett,* who willfully sought to evade his tax obligations by failing to file any tax returns, and then filed a delinquent return only after the commencement of a Government investigation, is neither reasonable nor rational.

Moreover, even as a general proposition the Goverment's argument is unavailing. The Government argues that once it refers a case for criminal prosecution it no longer has available to it the summons procedure authorized under Section 7602. *United States* v. *LaSalle National Bank,* 437 U.S. 298, 308-309 (1978). Therefore, it should be permitted to wait until resolution of the criminal proceeding before being required to commence its civil assessment procedure. This argument is wanting in several respects. Presumably the Internal Revenue Service does not refer a case to the Department of Justice for criminal prosecution until it has collected substantial evidence of fraud. Additionally, it must be noted that in any criminal proceeding for tax evasion the Government must necessarily prove the elements of the civil deficiency if it is to establish criminality.

The only real problem which the Government may face with respect to simultaneous criminal and civil proceedings is the opportunity presented to the taxpayer to obtain in the civil arena that which it could not obtain in the criminal proceeding. The problem, however, does not justify the extreme position espoused by the Government, i.e., that it be permitted to wait forever before instituting civil proceedings—particularly since the Government

is not without other remedies. The Government can request and in many instances the taxpayer will agree to extend the period of limitations under Subsection 6501 (c)(4). Moreover, even if the taxpayer refuses to agree to extend the limitations period the Government may properly seek relief from the courts. This is exactly what occurred in *Campbell* v. *Eastland*, 307 F.2d 478 (5th Cir. 1962). In *Campbell* the Government was party to a civil case while a criminal investigation was pending based on the same facts. The Fifth Circuit did not bar the civil proceeding nor did the Government ask that it do so. The Court of Appeals did, however, protect the Government against the danger upon which it premises this argument. Thus, the Court prevented the taxpayer from using the civil case as a means of obtaining discovery that could not have been obtained in the criminal proceeding. Petitioner submits that the holding in *Campbell* illustrates that the Courts can afford the Government ample means to prevent a taxpayer from abusing the civil process to obstruct criminal prosecution should such a case arise.

Moreover, the problem of which the Government complains is equally applicable when a taxpayer fails to file a return in order to defeat the tax. When such a taxpayer subsequently files his honest delinquent return, the three-year period of limitations commences to run notwithstanding that the Government may have elected to go forward with a criminal prosecution. *Bennett* v. *Commissioner*. Obviously the very same "policy" consideration present in the fraudulent failure to file situation is present in a false filing case. Indeed, the investigation in the false filing situation is likely to be more difficult since the Government does not have the benefit of two contradictory returns subscribed and sworn to by the taxpayer. Yet, the Government has already embraced the rationale of *Bennett* in Rev. Rul. 79-178, 1979-1 C.B. 435.

Petitioner submits that the Government's inconsistent positions strongly indicate that its concerns with respect to the difficulties of simultaneous civil and criminal proceedings are simply not persuasive.

2) The difficulty of proving fraud.

The Government contends that because it must prove fraud in a civil case by clear and convincing evidence, it should not be limited to a three year period for civil assessment after a non-fraudulent amended return is filed. The Government further contends that its burden is not significantly reduced when it receives an accurate amended return for the taxpayer (Respondent's Rule 22 Brief p. 10).

The validity of the Government's assertion suffers from the rather obvious fact that upon the filing of an amended return, the Government has the benefit of an honest return which it can compare and contrast with the original fraudulent return. The contrast between the amounts set forth in the fraudulent return and the modification made by the amended return typically will be of considerable aid to the Government in meeting its burden of proof, even in a criminal proceeding where the Government's burden is even greater. For example, in *United States* v. *Rischard*, 471 F.2d 105 (8th Cir. 1973), the taxpayer's amended returns were utilized by the Government to prove a pattern of consistent understatement of income which was held to be "persuasive evidence of willful intent" 471 F.2d at 107.

What truly undermines the Government's argument, however, is its very position as expressed in Rev. Rul. 79-178, 1979-1 C.B. 435. This ruling re-stated the Tax Court's decision in *Bennett* v. *Commissioner*. The facts presented in that ruling were as follows:

> "The taxpayer willfully failed to file a 1974 tax return in order not to pay income tax due. During the Service investigation, the taxpayer filed a correct, but delinquent, 1974 return on June 1, 1976. On completion of its investigation, the Service determined that the taxpayer was subject to the civil fraud penalty under section 6653(b) of the Code for failure to pay tax."

The Government's holding was as follows:

> "The tax cannot be assessed at any time under section 6501(c) of the Code, but must be assessed within the three-year period of limitations provided in section 6501(a)."

Petitioner submits that the Government's own ruling is dispositive of this argument. In case of a false filing the burden of proving fraud obviously is reduced to some extent due to the simple fact that the Government has in its possession two separate contradictory documents, each subscribed to by the taxpayer. In the situation presented in *Bennett*, and reflected in the above ruling, the Government has only the single document, the "delinquent" return. Unquestionably the Government's problem in establishing the requisite intent to defraud by clear and convincing evidence is even greater when it has only one return than in the case where it has two conflicting returns. Petitioner cannot explain the basic inconsistency in this approach and submits that neither can the Government.

3) The six year limitations period of Subsection 6501 (e) (1)(A).

The Government has also put forth a supposed policy argument based upon Subsection 6501(e)(1)(A) which provides that a taxpayer who omits an amount in excess of twenty five percent of his gross income from his return is subject to a six-year period of limitations. The courts have held that this period is not reduced by the filing of an amended return. *Houston* v. *Commissioner*, 38 T.C. 486 (1958); *Goldring* v. *Commissioner*, 20 T.C. 79 (1958). The Third Circuit noted the application of Subsection 6501(e)(1)(A) and concluded that it would be inappropriate for persons who filed an allegedly fraudulent return to be placed in a "better" position than those who made a substantial but non-fraudulent omission on their returns. *Badaracco* v. *Commissioner*, 693 F.2d at 302.

This conclusion ignores essential considerations. Subsection 6501(e)(1)(A) is not an exception to the three year limitation contained in Subsection 6501(a). Rather, it is a self-contained substitute statute of limitations and has no relationship to Subsection 6501(a) or 6501(c). *Klemp* v. *Commissioner*, 77 T.C. at 206. In fact Subsection 6501(e) expressly provides that it does not apply whenever one of the exceptions of Subsection 6501(c) is involved.

In its original decision in *Dowell* v. *Commissioner*, 68 T.C. 646 (1977), *rev'd*, 614 F.2d 1263 (10th Cir. 1980) the Tax Court placed significance on its holdings in *Goldring* v. *Commissioner*, and *Houston* v. *Commissioner*, in which the returns contained an omission of more than 25% of gross income. In each case the Tax Court held that the subsequent filing of an amended return not containing such an omission did not shorten the already existing limitations period under the statutory predecessor

of Subsection 6501(e)(1)(A). The Tax Court held that the amended returns could not "relate back" to the original returns and shorten the special lengthened assessment period that began upon the filing of such returns. In neither case, however, did the Court consider the question of whether the filing of amended returns could begin the three year period of limitations under the predecessor to current Subsection 6501(a). The rejection of the position urged by the taxpayers in *Goldring* and *Houston* was based upon the theory that its adoption might deprive the Government of the full statutory period to review a return. That is definitely not a danger in the instant case, for there is no doubt that the Government had the benefit of the full three year period provided under Subsection 6501(a) to review and assess after the filing of Taxpayer's amended returns.

Further, the distinction which is ignored by the Government, between filing an amended return for purposes of Subsection 6501(e)(1)(A) and Subsection 6501(c), is basic. In the former situation the filing of an amended return would *shorten* a statute of limitations which is already running. In the latter situation, the period of limitations has not commenced since a fraudulent return or a failure to file commences nothing. By filing a non-fraudulent "delinquent" or "amended" return, the taxpayer does not alter an extant limitations period. Rather, the taxpayer seeks to start a period of limitations.

Another major consideration which the Third Circuit ignored is the extremely drastic penalties which may be visited upon a taxpayer who files a fraudulent return or fraudulently fails to file. Had these been considered there could be no justification for the statement that a taxpayer who files a return for which Subsection 6501(e)(1)(A) is applicable is in a better position than one who files

a fraudulent return under Subsection 6501(c)(1). As already noted, the taxpayer who omits 25% of income from his return does have the benefit of a statute of limitations. The taxpayer whose return is subject to Subsection 6501(c)(1) receives no such benefit. Only when such a taxpayer files an honest and complete amended return, does he receive that limited benefit. But the filing of the amended return does not remove the possibility of criminal prosecution or the imposition of the 50% civil fraud penalty. Indeed, the very act of filing amended returns has probably heightened such possibilities.

The overwhelming severity of indictment and conviction for tax fraud need no elaboration. Even if the taxpayer files the amended returns subsequent to the expiration of the six-year statute of limitations for criminal prosecution, he has given the Government strong evidence to press the imposition of the 50% civil fraud penalty available under Section 6653(b). The severity of this sanction is highlighted by the fact that if fraud is found to exist in any part of the return, the civil fraud penalty applies to the entire deficiency, *Goldberg* v. *Commissioner*, 239 F.2d 316 (5th Cir. 1956), and the penalty even survives the taxpayer's demise, *Kirk* v. *Commissioner*, 179 F.2d 619 (1st Cir. 1950).

Petitioner submits that the so called policy considerations advanced by the Government are illusory. Moreover, even were they persuasive, they must yield to basic overriding concerns. Despite the vast bureaucratic machinery available to the Government, it is beyond doubt that the tax system of the United States is for the most part dependent upon voluntary self-assessment by its taxpayers. *Lucia* v. *United States*, 474 F.2d 565 (5th Cir. 1973). In the case at bar, a voluntary self-assessment resulted in Taxpayer coming forth and filing its amended

return, giving the Government all the information it needed to assess any tax due. For over six years after the filing of these returns, the Government took no action to assess the tax. Then, after that considerable period of time had passed, the Government sought to assess the tax, saying in effect to Taxpayer—since your alleged wrongdoing was the filing of a false tax return instead of attempting to evade the tax by fraudulently failing to file, you are not entitled to avail yourself of the general statute of limitations provided by Congress to all taxpayers who give the Government the information it needs to assess, even though you came forward voluntarily and filed your amended return without any pressure from us. The enunciation of such a policy by the Government not only results in punishment for those who reassess their prior acts and voluntarily come forth and file amended returns, but also places a premium on silence —elevating one form of tax fraud over another—for it suggests to those citizens who would commit tax fraud that it is better to remain silent and gamble on nondetection than to repent and confess all by filing an amended return.

If Taxpayer has initially run afoul of its duty of self-assessment, Congress has provided the most severe sanctions to penalize such conduct. Those sanctions are embodied in the penal provisions of the Internal Revenue Code, and in the imposition of the fraud penalty under Section 6653(b). The Government seeks to add yet another penalty without the slightest indication that Congress intended to do so. The Government would consign Taxpayer to the never ending limbo of a period for governmental assessment that lasts until eternity and beyond.

CONCLUSION

Petitioner submits that for the reasons hereinabove stated the filing of an honest amended tax return commences the running of the statute of limitations provided in Subsection 6501(a). Therefore, the decision of the United States Court of Appeals for the Third Circuit should be reversed and the judgment of the United States District Court for the District of New Jersey in favor of the Petitioner be reinstated and affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1983

ERNEST BADARACCO, SR., ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

DELEET MERCHANDISING CORP., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Section 6501(a) of the Internal Revenue Code of 1954 (26 U.S.C.) provides, as a general rule, that "the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed * * *." Section 6501(c)(1) sets forth an exception to the general rule applicable "[i]n the case of a false or fraudulent return with the intent to evade tax," providing that, in such cases, "the tax may be assessed * * * at any time."

The question presented is whether, notwithstanding Section 6501(c)(1), a taxpayer who has filed a false or fraudulent return for a particular year may, by later filing a nonfraudulent amended return for that year, secure the benefit of the normal three-year limitations period running from the date the amended return is filed.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1453

ERNEST BADARACCO, SR., ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

No. 82-1509

DELEET MERCHANDISING CORP., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (B. Pet. App. 4a-20a; D. Pet. App. 1a-17a)[1] is reported at 693 F.2d 298. The opinion of the Tax Court in No.

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[1] "B. Pet. App." refers to the appendix accompanying the petition in the *Badaracco* case. "D. Pet. App." refers to the appendix accompanying the petition in the *Deleet* case.

82-1453 (B. Pet. App. 21a-27a) is unofficially reported at 42 T.C.M. (CCH) 573. The opinion of the district court in No. 82-1509 (D. Pet. App. 1d-5d) is reported at 535 F. Supp. 402.

JURISDICTION

The judgment of the court of appeals (B. Pet. App. 2a-3a; D. Pet. App. 1b-2b) was entered on November 29, 1982. Petitions for rehearing were denied on December 20, 1982 (B. Pet. App. 1a) and on December 23, 1982 (D. Pet. App. 1c-2c). The petitions for writs of certiorari were filed on February 24, 1983 (No. 82-1453) and March 11, 1893 (No. 82-1509). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of Sections 6501, 6503 and 6653 of the Internal Revenue Code of 1954 (26 U.S.C.) are set out in a statutory appendix (App., *infra*, 1a-5a).

STATEMENT

a. *No. 82-1453.* Petitioners Ernest Badaracco, Sr., and Ernest Badaracco, Jr., were partners in an electrical contracting business. They filed individual and partnership tax returns for 1965 through 1969; they concede that those returns fraudulently understated their income (B. Pet. App. 23a; J.A. 35a-37a). On August 17, 1971, after federal grand juries had subpoenaed the partnership's records, petitioners filed nonfraudulent amended returns for each year in question (B. Pet. App. 7a, 24a). Three months later, petitioners were indicted for filing false and fraudulent tax returns in violation of Section 7206(1) of

the Code.[2] Each pled guilty to the charge of filing a false and fraudulent partnership return for 1967, and a judgment of conviction was entered on June 6, 1973. *United States* v. *Badaracco*, Crim. No. 766-71 (D.N.J.). The remaining 14 counts of the indictment were dismissed (B. Pet. App. 7a, 24a).

On November 21, 1977, the Commissioner of Internal Revenue mailed notices of deficiency to petitioners for each year, asserting liability under Section 6653(b) for additions to tax ("penalties") on account of fraud (J.A. 5a-7a). Petitioners sought redetermination of the deficiencies in the Tax Court, contending that the Commissioner's action was barred by the statute of limitations. Petitioners stipulated that the underpayments of tax reflected on their original returns for 1965 through 1969 were, in fact, due to fraud (J.A. 35a-37a). Yet they contended that Section 6501(c)(1), which permits the Commissioner to assess taxes "at any time" in the case of fraudulent returns, did not apply. In petitioners' view, their 1971 filing of nonfraudulent amended returns triggered operation of the general three-year statute of limitations specified in Section 6501(a). Because the Commissioner failed to send the deficiency notices within three years of the date their amended returns were filed, petitioners argued, assessment of the fraud penalties was barred. The Tax Court, following its decision in *Klemp* v. *Commissioner*, 77 T.C. 201 (1981), appeal pending, No. 81-7744 (9th Cir.), agreed with petitioners. B. Pet. App. 21a-27a.[3] Ac-

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[2] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended ("the Code" or "I.R.C.").

[3] In *Klemp*, the Tax Court, in a reviewed decision with five judges dissenting, overruled its prior holding in *Dowell* v. *Commissioner*, 68 T.C. 646 (1977), rev'd, 614 F.2d 1263

cord, *Dowell* v. *Commissioner*, 68 T.C. 646 (1977), rev'd, 614 F.2d 1263 (10th Cir. 1980), petition for cert. pending, No. 82-1873; *Britton* v. *United States*, 532 F. Supp. 275 (D. Vt. 1981), aff'd mem., 697 F.2d 288 (2d Cir. 1982) (table).

b. *No. 82-1509.* Petitioner Deleet Merchandising Corp. ("Deleet") filed timely corporate income tax returns for 1967 and 1968; these returns failed to report certain receipts derived from its printing supply business. On August 9, 1973, Deleet filed amended returns for 1967-1968 disclosing the unreported receipts (J.A. 57a-70a).[4] After the completion of criminal and civil investigations stemming from disclo-

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(10th Cir. 1980), that the unlimited assessment period specified in Section 6501(c)(1) continues to apply in such circumstances.

[4] Deleet asserts (D. Br. 6, 27) that its amended returns were "completely accurate" and that it acted "voluntarily and without any coercion from the Government whatsoever." The Commissioner, however, has asserted additional deficiencies in tax for 1967-1968, beyond the amounts shown as due on Deleet's original and amended returns, and Deleet's correct tax liability has not yet been determined. And while it is not material here whether the amended returns were, in fact, voluntarily submitted, the examining agent's audit report, which was filed with the district court, indicates that Deleet amended its returns only after one Martin Windell, a former corporate officer, had threatened to disclose to the Internal Revenue Service an alleged scheme by Deleet's officers to divert corporate profits to themselves. See Defendant's Answers to Plaintiff's First Set of Interrogatories, Exh. 1, pp. 1-2. Although Deleet has not conceded that its original returns were fraudulent, both the district court (D. Pet. App. 4d) and the Third Circuit (D. Pet. App. 3a n.3) assumed, for purposes of Deleet's summary judgment motion, that they were. The same assumption should govern disposition of the case in this Court.

sures made by certain of Deleet's officers,[5] the Commissioner, on December 14, 1979, issued a notice of deficiency to the company (D. Pet. App. 4a; J.A. 71a). The notice asserted deficiencies in tax and fraud penalties for 1967 and 1968.[6]

Deleet paid the disputed amounts and brought suit for a refund in the United States District Court for the District of New Jersey. On motion for summary

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[5] These investigations focused on allegations that corporate receipts had been diverted to company employees. See p. 4 n.4, *supra*. Deleet itself was not charged with criminal tax violations, nor was a formal criminal investigation initiated as to it. On March 6, 1976, however, a two-count information was filed against Martin Windell, a former officer and shareholder, charging him with omitting from his 1969-1970 individual tax returns substantial sums that had been diverted from the company. Mr. Windell pled guilty to one count of violating Section 7201 (governing willful attempts to evade or defeat tax); the second count was dismissed. See *United States* v. *Windell*, Crim. No. 76-96 (D.N.J. May 28, 1976). Contrary to Deleet's assertion, Br. 36 n.15, the record in this case reflects these matters. See Defendant's Answers to Plaintiff's First Request for Production of Documents, Exh. 1, pp. 2, 7-8; Defendant's Answers to Plaintiff's First Set of Interrogatories, Exh. 1, pp. 1-2, 6-7, 9, 47. At all events, this Court may take judicial notice of the related court proceedings. See *Bryant* v. *Carleson*, 444 F.2d 353, 357-358 (9th Cir.), cert. denied, 404 U.S. 967 (1971).

[6] On the same date, the Commissioner sent deficiency notices to several of Deleet's officers, asserting deficiencies in tax and liability for civil fraud penalties against them. See *Kramer* v. *Commissioner*, 44 T.C.M. (CCH) 42 (1982); *Liroff* v. *Commissioner*, 44 T.C.M. (CCH) 43 (1982); *Derfel* v. *Commissioner*, 44 T.C.M. (CCH) 45 (1982); *Liroff* v. *Commissioner*, 44 T.C.M. (CCH) 47 (1982). Following its decision in *Klemp*, the Tax Court in each case held that assessment of the deficiencies and fraud penalties was barred by the three-year statute of limitations.

judgment, Deleet contended that the Commissioner's action was barred by the statute of limitations. It argued, as petitioners had argued to the Tax Court in *Badaracco*, that no deficiencies or penalties could be assessed more than three years after its amended returns were filed, regardless of whether its original returns were fraudulent. The district court agreed, likewise relying on *Dowell* and *Klemp*, and granted summary judgment in favor of Deleet. D. Pet. App. 1d-5d.

c. *The appeals.* The government appealed to the Third Circuit from the Tax Court's decision in No. 82-1453 and from the district court's judgment in No. 82-1509. The cases were heard together and decided in a single opinion by the court of appeals, which reversed in both cases, one judge dissenting. B. Pet. App. 4a-20a; D. Pet. App. 1a-17a.

The majority reasoned (B. Pet. App. 9a) that Section 6501(c)(1) on its face permits the Commissioner, "[i]n the case of a false or fraudulent return with the intent to evade tax," to assess the tax, or to proceed in court without an assessment, "at any time." The court found nothing in the Code, its legislative history, or the Treasury Regulations to suggest that taxpayers who had filed fraudulent returns could thereafter secure, by filing amended returns or otherwise, the benefit of the general three-year limitations period. While rejecting petitioners' argument that questions of statutory construction should be answered by reference to "tax policy," the court observed (B. Pet. App. 10a-13a) that substantial policy considerations in fact supported a literal reading of the statute. The court noted that Congress has charged the Commissioner with the duty of proceeding both criminally and civilly against taxpayers

who file fraudulent returns, and it found "strong reasons for believing that a three year limitations period is not adequate to permit the Commissioner to meet his dual responsibility." B. Pet. App. 12a-13a. Accord, *Nesmith* v. *Commissioner*, 699 F.2d 712 (5th Cir. 1983) (per curiam), petition for cert. pending, No. 82-2008. The dissenting judge expressed agreement with the Tenth Circuit's decision in *Dowell* and stated that, in his view, the Commissioner has no need for an unlimited assessment period once an amended return has been filed that provides "all the information required by law" (B. Pet. App. 18a).

SUMMARY OF ARGUMENT

These cases involve construction of the statute of limitations on tax assessments. Section 6501(a) ordinarily requires the Commissioner to assess the tax within three years after a return is filed. Section 6501(c), however, lists several situations in which the tax may be assessed "at any time." One of these situations, specified in Section 6501(c)(1), is a "case of a false or fraudulent return with the intent to evade tax." The question presented here is whether, under circumstances where a taxpayer has filed a false or fraudulent return, but has thereafter filed a nonfraudulent amended return, the timeliness of the Commissioner's assessment is governed by the general three-year limitations period of Section 6501(a) or by the unlimited assessment period of Section 6501(c)(1).

1. The court of appeals correctly held that the Commissioner is entitled to the continued benefit of Section 6501(c)(1) in such circumstances. The language of that Section, permitting assessment "at any time" in the case of fraudulent returns, is unqualified

on its face. Nothing in Section 6501(c)(1) or its legislative history suggests that a fraudulent filer can "call off" its operation by filing an amended return, or by otherwise repenting of his fraud. Since statutes of limitations "must receive a strict construction in favor of the Government," *E.I. Dupont de Nemours & Co.* v. *Davis*, 264 U.S. 456, 462 (1924), the plain language of the statute should govern the outcome here.

The natural reading of the statutory language is strongly supported by the overall structure of the Code's limitations provisions. The Code nowhere explicitly provides for the filing of amended returns, and Congress is thus unlikely to have intended that they would affect the operation of Section 6501. Until the Tenth Circuit's decision in *Dowell*, this Court and the lower courts had consistently held, in a variety of situations, that the application of the limitations provisions turns on a taxpayer's original, and not his amended, returns. Petitioners' proposed statutory construction, moreover, produces anomalous results when its impact on other portions of Section 6501 is considered.

The natural reading of the statutory language is likewise supported by the substantive operation of the fraud provisions themselves. It is well established that a taxpayer does not, by subsequent repentance, immunize himself from liability for a fraudulent filing. If an amended return does not bar the imposition of the fraud penalty, it should not cut short the time within which that penalty may be assessed.

2. Petitioners do not seriously dispute that a literal reading of Section 6501 supports the court of appeals' holding. Rather, they urge a nonliteral reading of the

statute on grounds of equity and tax policy. They contend that the Commissioner no longer needs an unlimited assessment period once he has the information that a nonfraudulent amended return provides him.

The court of appeals correctly held that strong policy reasons in fact support a literal reading of the statute. Fraud is difficult to investigate, and the Commissioner must bear the burden of proving it. While an amended return may evidence an underpayment of tax, it does not, standing alone, constitute an admission of fraud. Amended returns, moreover, come with no special guarantee of trustworthiness; the information they furnish must be investigated no less thoroughly than other post-return information provided by a taxpayer or third parties. Most importantly, the Commissioner has a duty to proceed both criminally and civilly against taxpayers who file fraudulent returns. Once a case has been referred to the Justice Department for criminal prosecution, the Commissioner, for reasons of policy and practicality, will generally find it difficult to complete his civil audit within the normal three-year period, and the filing of an amended return will make no difference in this respect.

3. In an effort to find some textual support for their proposed statutory construction, petitioners contend that their fraudulent original returns should be deemed "nullities," *i.e.*, "non-returns," for purposes of Section 6501(a), and that their amended returns are thus the only "returns" for the taxable years in question. But there is no authority for the proposition that a return which purports on its face to be a return is a "nullity" merely because it is fraudulent. Indeed, Section 6501(c)(1) itself uses the phrase,

"false or fraudulent return," plainly indicating that such documents are "returns" for statute-of-limitations purposes.

4. Finally, petitioners object to a literal reading of the statute because it produces a "disparity in treatment" as between fraudulent filers and fraudulent non-filers. It is settled that the normal three-year limitations period begins running when a taxpayer submits a late-filed return, regardless of whether his failure to file timely was due to fraud. Petitioners contend that the result should be the same when a taxpayer who has filed a fraudulent return later submits an honest amended one.

The plain language of the statute, however, mandates different results in these two situations. Section 6501(c)(3) permits assessment at any time "[i]n the case of failure to file a return." That section thus becomes inapplicable by its terms once a return is filed. Section 6501(c)(1), by contrast, applies indefinitely when a fraudulent return has been submitted, since the case remains a "case of a false or fraudulent return" regardless of the taxpayer's later conduct. Congress simply did not distinguish, for limitations purposes, between fraudulent and non-fraudulent failures to file, whereas it separately addressed the problem of fraudulent returns in Section 6501(c)(1).

ARGUMENT

THE COURT OF APPEALS CORRECTLY HELD THAT, WHERE A TAXPAYER FILES A FALSE AND FRAUDULENT INCOME TAX RETURN FOR ANY YEAR, THE TAX FOR THAT YEAR MAY BE ASSESSED OR COLLECTED AT ANY TIME, REGARDLESS OF WHAT STEPS THE TAXPAYER MAY LATER TAKE

These cases involve the proper construction of the statute of limitations on tax assessments. It has long been established that statutes of limitations restricting the assertion of federal rights "must receive a strict construction in favor of the Government." *E.I. Dupont de Nemours & Co.* v. *Davis*, 264 U.S. 456, 462 (1924). This principle has special force as applied to federal tax claims. This Court has stressed "[t]he necessity for meticulous compliance by the taxpayer with all named conditions in order to secure the benefit of the limitation." *Lucas* v. *Pilliod Lumber Co.*, 281 U.S. 245, 249 (1930). The courts of appeals have repeatedly held that statutes barring collection of federal taxes "are strictly construed in favor of the government" and that "their applicability will not be presumed in the absence of clear congressional action." *McDonald* v. *United States*, 315 F.2d 796, 801 (6th Cir. 1963). See, *e.g.*, *Lucia* v. *United States*, 474 F.2d 565, 570 & n.14 (5th Cir. 1973) (citing cases).

A. The language of Section 6501(c)(1) unambiguously permits assessment at any time in the case of a false or fraudulent return, and this natural reading of the statutory language comports with the overall structure and operation of the Code's limitations provisions

1. The statutory scheme governing limitations on tax assessments is outlined in Section 6501 of the Code. Section 6501(a) sets forth the general rule

establishing a three-year period of limitations on the assessment and collection of any tax. It states: "Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) * * *." Section 6501(e)(1)(A) sets forth an extended limitations period in situations where a taxpayer's return nonfraudulently omits more than 25% of his gross income, permitting assessment in such cases "at any time within 6 years after the return was filed." Both the three-year rule and the six-year rule, however, are explicitly made inapplicable in circumstances covered by Section 6501(c).

Section 6501(c) identifies three situations in which the Commissioner is allowed an unlimited period within which to assess tax. Section 6501(c)(1) provides: "In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time." Section 6501(c)(3) provides that, "[i]n the case of failure to file a return, the tax may be assessed * * * at any time." And Section 6501(c)(2) sets forth a similar rule in the case of willful attempts to evade or defeat taxes other than income, estate, and gift taxes.[7]

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[7] A question as to the application of Section 6501(c)(2) similar to that presented here was considered, but not decided, by the Fifth Circuit in *Woolf* v. *United States*, 578 F.2d 1103, 1106 (1978). Contrary to Deleet's contention (D. Br. 31), the Fifth Circuit in *Woolf* did not reject "an overly literal construction" of the statute. Indeed, the Fifth Circuit has since ruled in favor of the Commissioner on the precise question reserved in *Woolf* and presented here. See *Nesmith* v. *Commissioner*, 699 F.2d 712 (5th Cir. 1983), petition for cert. pending, No. 82-2008.

The instant cases are squarely controlled by the unambiguous language of Section 6501(c)(1). Petitioners concededly filed (or are deemed for purposes of decision to have filed) "false or fraudulent return[s] with the intent to evade tax." Section 6501(c)(1), allowing the tax to be assessed "at any time" in such circumstances, is unqualified on its face. Nothing in the statute or its legislative history can be construed to "call off" its operation in light of a fraudulent filer's later conduct.[8] Nor is there anything in Section 6501(a) that enables a taxpayer to reinstate its general, three-year limitations period by filing an amended return. Indeed, as discussed more fully below (pp. 31-32, *infra*), the Code does not explicitly provide either for a taxpayer's filing, or for

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[8] The filing of a false or fraudulent return has, under every income tax statute since 1918, indefinitely extended the period of limitations for assessment of tax. See, *e.g.*, Revenue Act of 1918, ch. 18, § 250(d), 40 Stat. 1083 ("In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due"); Revenue Act of 1921, ch. 136, § 250(d), 42 Stat. 265 ("[I]n the case of a false or fraudulent return with intent to evade tax, or of a failure to file a required return, the amount of tax due may be determined * * * at any time after it becomes due * * *"). See generally 10 J. Mertens, *Law of Federal Income Taxation* § 57.36 (1976). The legislative history is sparse. The Senate Report accompanying Section 276(a) of the Revenue Act of 1934, ch. 277, 48 Stat. 745, states Congress's intention that the Commissioner be permitted to assess the tax "without regard to the statute of limitations" in the case of a fraudulent return. S. Rep. No. 558, 73d Cong., 2d Sess. 43 (1934). Reports from earlier years are silent on the provision or simply repeat the statutory language. *E.g.*, H.R. Rep. No. 767, 65th Cong., 2d Sess. 34-35 (1918); S. Rep. No. 275, 67th Cong., 1st Sess. 21, 32 (1921); H.R. Rep. No. 179, 68th Cong., 1st Sess. 26 (1924).

the Commissioner's acceptance, of amended returns, which are creatures of administrative origin. Thus, when Congress provided for assessment at any time "[i]n the case of a false or fraudulent return," Congress plainly meant "[i]n the case of a false or fraudulent [*original*] return"—precisely the situation here. Until the Tenth Circuit's decision in *Dowell*, the courts had consistently held, in decisions dating to the earliest years of the federal income tax, that the operation of Section 6501 and its predecessors turns on the nature of the taxpayer's original, and not his amended, returns.[9] These decisions, like the decision below, properly accorded the statute its plain—indeed, its only reasonable—construction.

2. The conclusion that Section 6501(c)(1) permits assessment "at any time" in fraud cases, regardless of a taxpayer's later repentance, is confirmed by the substantive operation of the fraud provisions themselves. It is well established that a taxpayer who sub-

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[9] The courts had uniformly held, for example, that the filing of an amended return does not serve to extend the period within which the Commissioner may assess a deficiency. *E.g.*, *Zellerbach Paper Co.* v. *Helvering*, 293 U.S. 172 (1934); *National Paper Products Co.* v. *Helvering*, 293 U.S. 183 (1934); *National Refining Co.* v. *Commissioner*, 1 B.T.A. 236 (1924). The courts had also held that the filing of an amended return does not serve to reduce the period within which the Commissioner may assess taxes where the original return omits enough income to trigger the operation of the extended (now, six-year) limitations period provided by Section 6501(e) or its predecessors. *Houston* v. *Commissioner*, 38 T.C. 486 (1962); *Goldring* v. *Commissioner*, 20 T.C. 79 (1953). And the courts had held that the statute of limitations for filing a refund claim under the predecessor of Section 6511(a) begins to run on the filing of the original, not the amended, return. *Kaltreider Construction, Inc.* v. *United States*, 303 F.2d 366, 368 (3d Cir.), cert. denied, 371 U.S. 877 (1962).

mits a fraudulent return does not, by subsequent voluntary disclosure, thereby purge the fraud inherent in his prior act; the fraud was committed, and the offense completed, when the original return was prepared and filed. See, *e.g.*, *United States* v. *Habig*, 390 U.S. 222 (1968); *Plunkett* v. *Commissioner*, 465 F.2d 299, 302-303 (7th Cir. 1972); *Swallow* v. *United States*, 307 F.2d 81 (10th Cir. 1962).[10] Once a fraudulent return has been filed, in short, the case remains a "case of a false or fraudulent return," regardless of the taxpayer's later conduct, for purposes of criminal prosecution and civil fraud liability under Section 6653(b). The case should likewise remain a "case of a false or fraudulent return" for purposes of the unlimited assessment period provided by Section 6501(c)(1). As Judge Parker of the Tax Court wrote in her *Klemp* dissent, "[if] the filing of a nonfraudulent amended return does not bar the imposition of the fraud penalty itself, * * * it should not cut short the time within which that penalty may be assessed." 77 T.C. at 211-212 (Parker, J., dissenting).

3. Petitioners suggest that Section 6501(c)(1) should be read merely to "suspend" commencement of

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[10] This well-established principle was recognized by the dissenting judge below (B. Pet. App. 19a n.7) and by the Tax Court in *Klemp* (77 T.C. at 206 n.9). As the Tax Court explained in *George M. Still, Inc.* v. *Commissioner*, 19 T.C. 1072, 1077 (1953), aff'd, 218 F.2d 639 (2d Cir. 1955):

> Any other result would make sport of the so-called fraud penalty. A taxpayer who had filed a fraudulent return would merely take his chances that the fraud would not be investigated or discovered, and then, if an investigation were made, would simply pay the tax which he owed anyhow and thereby nullify the fraud penalty. We think Congress has provided no such magic formula to avoid the civil consequences of fraud.

the limitations period while fraud remains uncorrected, *i.e.*, "to deny to the taxpayer the benefits of a statute of repose for that period during which he has failed to discharge his legal obligation." D. Br. 15. The Tenth Circuit in *Dowell*, reasoning similarly, characterized Section 6501(c)(1) as putting the three-year limitations period "in limbo" pending further taxpayer action. 614 F.2d at 1265-1266.

The statutory language, however, is contrary to petitioners' contention. Section 6501(c)(1) does not "suspend" the operation of Section 6501(a) until a fraudulent filer makes voluntary disclosure; the former section makes no reference at all to the latter, providing simply that the tax may be assessed "at any time." And Section 6501(a) contains no mechanism for "snapping back into play" when a fraudulent filer repents; by its terms, it does not apply to any case—such as a "case of a false or fraudulent return"—that is "otherwise provided" for in Section 6501. Where Congress has intended only a temporary suspension of the running of the limitations period, it has had no difficulty drafting statutory provisions that unambiguously accomplish this result. See, *e.g.*, I.R.C. § 6503(a)(1) ("The running of the period of limitations provided in section 6501 * * * shall (after the mailing of a [deficiency] notice * * *) be suspended for the period during which the Secretary is prohibited from making the assessment * * *").[11] Congress evinced no intent to accomplish that result here.

4. The weakness of petitioners' proposed statutory construction is further shown by its impact on Sec-

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[11] See also, *e.g.*, I.R.C. § 6503(a)(2), (b), (c) and (d), App., 3a-5a, *infra*. Section 6503 as a whole is entitled, "Suspension of [R]unning of [P]eriod of [L]imitation."

tion 6501(e)(1)(A). As noted above, that Section sets forth an extended limitations period in situations where a taxpayer's return nonfraudulently omits more than 25% of his gross income, permitting assessment in such cases "at any time within 6 years after the return was filed." This rule evidently reflects a congressional judgment that, in cases of substantial but nonfraudulent omissions of income, the Commissioner needs an assessment period longer than the three-year period provided for routine tax investigations, but shorter than the unlimited period provided for cases of fraud.

In *Dowell* and *Klemp*, the Commissioner had issued his deficiency notices more than three years after the amended returns were filed, but less than six years after the original returns were filed. Those courts nevertheless ruled the notices untimely, holding that *both* Section 6501(c)(1) *and* Section 6501(e)(1)(A) were inapplicable. 614 F.2d at 1267; 77 T.C. at 206. Accord, *Britton*, 532 F. Supp. at 278.[12] As the Tax Court majority put it (77 T.C. at 206):

> Section 6501(e) explicitly does not apply to situations covered by section 6501(c). * * * Accordingly, no period of limitations began running upon the filing of petitioners' [fraudulent] original return. The only period of limitations that ever became applicable * * * is the [three-year] period provided in section 6501(a) * * *.

The results produced by this reasoning—which Deleet seems to concede (D. Br. 41-43) flow neces-

[12] Neither the Tax Court in No. 82-1453 nor the district court in No. 82-1509 was required to address the application of Section 6501(e)(1)(A) on the facts of the instant cases. In each case, the notice of deficiency was mailed more than six years after the original returns were filed.

sarily from petitioners' proposed statutory construction—are anomalous. Under the *Klemp* court's reasoning, a taxpayer who *fraudulently* omits 25% of his gross income can gain the benefit of the three-year limitations period by filing an amended return. Yet it is well established that a taxpayer who *innocently* omits 25% of his gross income cannot gain that benefit by filing an amended return; rather, he must live with the six-year period specified in Section 6501(e)(1)(A). *E.g.*, *Houston* v. *Commissioner*, 38 T.C. 486 (1962); *Goldring* v. *Commissioner*, 20 T.C. 79 (1953). As the court of appeals properly noted (B. Pet. App. 12a), there is no justification for "creat[ing] a situation in which persons who [commit] willful, deliberate fraud [are] in a better position" than those who understate their income inadvertently. The *Klemp* court's reasoning, moreover, entails no slight embarrassment to logic, for it assumes that Section 6501(c)(1) is both applicable (in that it is capable of ousting Section 6501(e)) and inapplicable (in that it is incapable of ousting Section 6501(a)) at the same time.

5. In sum, there is scarcely room for doubt that, if the language of the statute is to be accepted at face value, the filing of "a return [that is] fraudulent in any respect with intent to evade a tax * * * deprives the taxpayer of the bar of the statute for that year." *Lowy* v. *Commissioner*, 288 F.2d 517, 520 (2d Cir. 1961), cert. denied, 368 U.S. 984 (1962). Accord, Brennan, *The Uncertain Status of Amended Tax Returns*, 7 Rev. Tax'n Individuals 235, 252-264 (1983) (hereinafter *Amended Tax Returns*) (concluding that *Dowell* and *Klemp* were wrongly decided). Nothing in Section 6501(a) or in Section 6501(c)(1) can properly be construed to start the

running of the ordinary limitations period, or any other limitations period, when a taxpayer who has filed a false or fraudulent return makes disclosure, in an amended return or otherwise, of his true taxable income. Rather, as the Third Circuit held here and as the Fifth Circuit held in *Nesmith*, the plain and unambiguous language of Section 6501(c)(1) permits the Commissioner to assess "at any time" the tax for a year in which there has been filed "a false or fraudulent return," notwithstanding any subsequent disclosures the taxpayer might make.

B. A literal construction of the statute is supported by sound considerations of policy and practicality

1. Petitioners do not seriously dispute—indeed, petitioner Deleet explicitly concedes—that a literal reading of Section 6501(c)(1) justifies the court of appeals' holding as to the timeliness of the Commissioner's deficiency determinations. D. Br. 24; see B. Br. 27-29. Petitioners contend, rather, that a flexible, nonliteral reading should be accorded the statute on grounds of equity and tax policy. "Once a taxpayer has provided the information upon which the Government may make a knowledgeable assessment," in petitioners' view, "the justification for suspending the limitations period is no longer viable and must yield to the favored policy of limiting the Government's time to proceed against the taxpayer." D. Br. 12; see B. Br. 17. This was the explicit rationale underlying the decision of the Tenth Circuit in *Dowell* (614 F.2d at 1265) and the majority opinion of the Tax Court in *Klemp* (77 T.C. at 205-206). See also *Britton*, 532 F. Supp. at 278.

These are cases of statutory construction. The question presented here is not whether, as an abstract matter, the rule advocated by petitioners accords with "[c]ommon sense" or "good policy." Contra, *Britton*, 532 F. Supp. at 278; *Klemp*, 77 T.C. at 205. The question, rather, is whether the policy petitioners favor was the policy Congress adopted in enacting Section 6501. As indicated above, the language of that section unambiguously reveals Congress's intention that *no* limitations period is to apply with respect to the assessment of taxes "[i]n the case of a false or fraudulent return." This Court has repeatedly held that courts are not authorized to rewrite a statute because they deem its effects harsh or its operation susceptible of improvement. See *TVA* v. *Hill*, 437 U.S. 153, 194-195 (1978); *United States* v. *Calamaro*, 354 U.S. 351, 357 (1957); *Lewyt Corp.* v. *Commissioner*, 349 U.S. 237, 240 (1955); *United States* v. *Olympic Radio & Television, Inc.*, 349 U.S. 232, 236 (1955). Especially is this so when the statute involved is a statute of limitations, which "must receive a strict construction in favor of the Government." *E.I. Dupont de Nemours & Co.*, 264 U.S. at 462.

In any event, contrary to petitioners' contentions, a literal reading of Section 6501(c)(1) is in fact supported by substantial considerations of tax policy. As the court of appeals held, there are "strong reasons" why Congress might conclude that the Commissioner should be entitled to the continued benefit of an unlimited assessment period, notwithstanding the filing of an amended return, where the taxpayer's original return was fraudulent. These considerations are not laid out in the legislative history of Section 6501, which is sparse (see p. 13 n.8, *supra*). Yet they

suffice to dispel any suggestion that the statutory scheme resulting from a literal construction of the section is erratic, irrational, or haphazard.

First, Congress surely recognized that fraud cases are ordinarily far more difficult to investigate than routine tax cases. This is so, in part, because the taxpayer's underlying records will frequently have been falsified or even destroyed.[13] In such circumstances, the filing of an amended return may not substantially diminish the amount of effort required to verify the correct tax liability.

Second, the arrival at an IRS Service Center of a document styled an "amended return" does not fundamentally change the nature of a tax fraud investigation. Amended returns, however accurate they may ultimately prove to be, come with no greater guarantee of trustworthiness than other submissions. A taxpayer suspected of having filed a fraudulent return may later give clues as to his true income, intentionally or inadvertently, in numerous ways—by cooperating with the examining agents, by filing an amended return, or by making admissions in court. Fraud may be disclosed by an informant's testimony, by the taxpayer's books, or by the books of those with whom the taxpayer has dealt. In each instance, the data supplied to the examining agent may or may not be accurate, may or may not be complete. A responsible examiner simply cannot accept the information furnished on an amended return—any more

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[13] The Internal Revenue Manual accordingly instructs examining agents that the "extensive documentation of adjustments required in a fraud case results in more detailed transcripts or extracts and more extended account verification than is required for the examination features in an ordinary case." 2 Internal Revenue Manual (Audit) (CCH) ¶ 4565.32 (3) (c) (1980).

than he can accept other information furnished by the taxpayer or third parties—as a substitute for a thorough investigation into the existence of fraud. There is no "tax policy" justification for holding that amended returns, of all the multifarious data that may bear on tax fraud, have the singular effect of shortening to three years the unlimited assessment period specified in Section 6501(c)(1).

Third, fraud cases differ from other civil tax cases in that the Commissioner has the burden of proof on the question of fraud. Whereas the Commissioner's notice of deficiency is generally entitled to a presumption of correctness, Section 7454(a) provides that, "[i]n any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, the burden of proof in respect of such issue shall be upon the Secretary." An amended return, of course, may constitute an admission of substantial underpayment. But it will not ordinarily constitute an admission of fraud. As Judge Parker said in her dissenting opinion in *Klemp*, 77 T.C. at 212-213:

> When a taxpayer files a nonfraudulent amended return * * * [the Commissioner] will not necessarily have all of the facts he needs to prove by clear and convincing evidence a fraudulent intent to evade tax. Absent proof of that specific intent, evidence of an underpayment standing alone will not support the imposition of the fraud penalty. Thus, while 3 years may be an adequate period within which to assert the fraud penalty where the taxpayer's fraudulent intent is established in prior criminal proceedings or by stipulation, the 3 years may not be enough time for [the Commissioner] to prove fraudulent intent where a more extensive investigation is required.

Fourth, and most importantly, the difficulties that attend a civil fraud investigation are compounded where, as in *Badaracco*, the Commissioner's initial findings lead him to conclude that the case should be referred to the Justice Department for criminal prosecution.[14] The statute of limitations for prosecuting criminal tax fraud is generally six years. See I.R.C. § 6531. Once a criminal referral has been made, the Commissioner will often find it difficult, if not impossible, to complete his civil investigation within the normal three-year period, and the taxpayer's filing of an amended return will not make any difference in this respect.

This Court has recognized the Commissioner's dual responsibility when investigating tax fraud. *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978). The Court there noted that "Congress has created a law enforcement system in which criminal and civil elements are inherently intertwined." *Id.* at 309. Indeed, it is the very interrelationship of these elements which dictates that, once a case has been referred for criminal prosecution, the ordinary tools provided by Congress for investigating civil tax liability—principally, the summons power of Section 7602—become unavailable to the Commissioner. See 437 U.S. at 311-313.[15] Practically speaking, there-

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[14] As noted above (p. 5 n.5 *supra*), criminal prosecution was not recommended against petitioner Deleet, but was recommended against one of Deleet's officers. After that proceeding ended, the civil investigation of the company and its officers continued, culminating in the issuance of deficiency notices to them for additional tax and fraud penalties. See p. 5 n.6, *supra*.

[15] After *LaSalle* was decided, Congress amended Section 7602 to permit the issuance of a summons to investigate both

fore, the Commissioner is often forced to place civil audits in abeyance when criminal prosecutions begin.[16]

Apart from such practical considerations, it has generally been the policy of the Internal Revenue Service to give priority to criminal enforcement, and, whenever possible, to defer civil assessment and collection until related criminal proceedings have ended. See, *e.g.*, 1 Internal Revenue Manual (Administration) (CCH) ¶ 1218, at 1303-78 (1983) ("Experience has demonstrated that attempts to pursue both the criminal and civil aspects of a case concurrently may jeopardize the successful completion of the criminal case"); 2 Internal Revenue Manual (Audit) (CCH) ¶¶ 4565.32(2), 4565.42 (1981).[17] Given the

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civil and criminal tax matters, so long as no "Justice Department referral is in effect." Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 333(a), 96 Stat. 622. The amendment became effective September 3, 1982.

[16] It is no answer to assert, as does petitioner Deleet (D. Br. 37), that the Commissioner will have collected substantial evidence of fraud before referring a case, or that the government must prove the elements of the civil deficiency "in any criminal proceeding for tax evasion." Not all criminal prosecutions involve tax evasion charges under Section 7201; even when they do, the government need only establish that there was a substantial understatement of tax liability, not the precise amount thereof. See, *e.g.*, *United States* v. *Norris*, 205 F.2d 828, 829 (2d Cir. 1953). Moreover, in a criminal prosecution under Section 7206(1), the government need establish only that false statements were made under penalties of perjury as to a material matter. See *United States* v. *DiVarco*, 343 F. Supp. 101 (N.D. Ill. 1972), aff'd, 484 F.2d 670 (7th Cir. 1973), cert. denied, 415 U.S. 916 (1974).

[17] The Manual alerts IRS personnel to the following risks, among others, in pursuing parallel civil and criminal investigations: (1) possible premature disclosure of evidence to a defendant; (2) claims of harassment by potential criminal

potential for conflict between the Commissioner's criminal and civil enforcement responsibilities, this policy of deferral has been recognized as both "necessary and wise." *Campbell* v. *Eastland*, 307 F.2d 478, 487 (5th Cir. 1962). In exceptional cases, as where collection is in jeopardy, the government may be forced to proceed on the civil front and seek protective orders to prevent interference with the criminal prosecution. But, as the court below concluded (B. Pet. App. 13a), there is nothing to indicate that Congress intended, in all cases, to "force the Commissioner to decide to proceed with only civil or criminal remedies or to jeopardize both by going forward civilly and criminally at the same time." See also *Amended Tax Returns* 262-263.[18]

2. Petitioners do not seriously dispute that these policy considerations generally support a "plain language" reading of the statute. Yet they vigorously contend (B. Br. 33-34; D. Br. 35-36) that such considerations do not apply on the facts involved here. In their view, the Commissioner should have had no

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defendants; (3) seizure of funds in a civil case that might deny a defendant the criminal attorney of his choice; (4) difficulties with witnesses where the civil trial precedes the criminal trial; and (5) difficulties with the introduction of evidence in a civil case owing to taxpayers' assertion of Fifth Amendment rights.

[18] This Court's decision in *United States* v. *Baggot*, No. 81-1938 (June 30, 1983), may further complicate the Commissioner's expeditious completion of civil audits in fraud cases. The Court there held that grand jury materials may not be disclosed to the IRS for use in civil tax investigations. Thus, while a grand jury may have seen considerable evidence of tax fraud, that evidence will often be unavailable to examining agents as they attempt to complete their civil audits. Rather, the agents will be required to "pick up where they left off" before the case was referred to the Justice Department.

difficulty in issuing deficiency notices within three years after *their* amended returns were filed.

This assertion, even if correct,[19] is irrelevant to decision in these cases. These cases involve construction of a statute of limitations, not a question of laches.[20] The question presented is whether the Commissioner is entitled, as a matter of law, to rely on the unlimited assessment period of Section 6501(c)(1) in cases involving tax fraud. If the court of appeals was correct in its reading of the statute, it is immaterial whether the Commissioner could have acted more promptly in these particular cases.

3. Besides questioning the "tax policy" justification for an unlimited assessment period, petitioners urge that a literal reading of the statute produces inequitable results. In petitioners' view, it is unfair

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[19] On petitioners' reading of Section 6501, the statute of limitations as to Deleet would have expired on August 9, 1976—less than three months after judgment was entered in the criminal tax fraud proceeding against one of its officers. See p. 5 n.5, *supra*. Under the IRS policy of deferring civil audits until the termination of related criminal cases, it would have been extremely difficult for the Service to have finished Deleet's civil audit, prepared the notice of deficiency, and subjected the case to normal administrative review within this time. Indeed, Deleet to this date has not conceded that its original returns were fraudulent, although it is assumed for purposes of decision (see p. 4 n.4, *supra*) that they were. The statute of limitations as to the Badaraccos, on their theory, would have expired on August 17, 1974—slightly more than a year after the criminal case ended. The record does not reveal why the Commissioner's civil investigation was not concluded by that date, or whether it reasonably could have been so concluded.

[20] It is well established that the United States is not subject to the defense of laches. *United States* v. *Summerlin*, 310 U.S. 414, 416 (1940).

for the government "to forever suspend a Sword of Damocles over a taxpayer who at one time may have filed a fraudulent return, but who has subsequently recanted and filed an amended return [that is honest]." D. Br. 26; see B. Br. 16. The dissenting judge below (B. Pet. App. 19a) stressed similar considerations.

Even if equitable considerations were relevant in construing a statute of limitations, they would have little force here. A taxpayer who has filed a fraudulent return with the intent to evade tax is scarcely in a position to complain of the fairness of a rule that facilitates the government's collection of the tax due. Nor is a taxpayer who has been the subject of a tax fraud investigation likely to be caught by surprise when the notice of deficiency arrives, even if it does not arrive promptly after he files an amended return. And petitioners' fear that the government will abuse the unlimited assessment period is unrealistic, for it is scarcely in the Commissioner's interest to delay a deficiency notice unnecessarily. Such delay would only complicate his burden of proving fraud by "clear and convincing evidence," *Kreps* v. *Commissioner*, 351 F.2d 1 (2d Cir. 1965), and could well increase the risk that the tax will become uncollectible in whole or part.

Finally, it cannot reasonably be contended, as petitioner Deleet further argues (D. Br. 14, 44), that a literal reading of the statute "punishes" taxpayers who repentently file amended returns. To the contrary, such a reading leaves them in precisely the same position they were in before. It might be argued that Congress should provide incentives to taxpayers to disclose their fraud voluntarily. But Congress has not chosen to do so in Section 6501, perhaps reasoning that taxpayers already have an incentive

to make voluntary disclosure in the hope of avoiding or mitigating criminal liability. At all events, that legislative judgment is controlling here.

C. A nonliteral reading of the statute cannot be justified on the theory that fraudulent returns are "nullities"

In an effort to find some textual support for their suggested statutory construction, petitioners contend (B. Br. 21-27; D. Br. 32-34) that their original returns, to the extent they were fraudulent, were "nullities" for statute-of-limitations purposes. If the original return is a nullity, the argument runs, the amended return must necessarily be "the return" referred to in Section 6501(a). And if "the return" (as thus defined) is nonfraudulent, the argument concludes, Section 6501(c)(1) is inoperative, and the normal three-year limitations period applies. See *Dowell*, 614 F.2d at 1265.

This argument was properly rejected (B. Pet. App. 8a-9a) by the court of appeals. The notion that fraudulent returns are "nullities" is unsupportable. And it is absolutely clear that "the return" referred to in Section 6501(a) is the original, not the amended, return.

1. Petitioners do not and cannot contend that their fraudulent original returns were "non-returns" for purposes of the Code generally. The numerous Code provisions relating to civil and criminal penalties for submitting or assisting in the preparation of "false or fraudulent returns" make clear that a document which on its face plausibly purports to be in compliance, and which is signed by the taxpayer, is a "return" despite its inaccuracies.[21] Nor do petitioners

[21] See, *e.g.*, I.R.C. § 7207 (criminal penalty for submission of a "return * * * known * * * to be fraudulent"); I.R.C. § 6531(3) (limitations period for criminal prosecution of per-

contend that their original returns were nullities for all purposes of Section 6501. Indeed, Section 6501 (c)(1) itself uses the phrase, "false or fraudulent return." If a fraudulent return is not a "return" for purposes of Section 6501(c)(1), the section is an oxymoron.

Petitioners contend, rather, that a fraudulent return is a nullity only for the limited purpose of applying Section 6501(a). See B. Br. 24; D. Br. 33-34. But the word "return" appears 64 times in Section 6501. Congress cannot rationally be thought to have given that word one meaning in Section 6501(a), and a totally different meaning in Section 6501(b) through (q).

Nor does this Court's decision in *Zellerbach Paper Co.* v. *Helvering*, 293 U.S. 172 (1934), support petitioners' argument that fraudulent returns are "nullities," whether for purposes of Section 6501(a) or for any other purpose. The Court there held that a taxpayer's original return, despite its inaccuracy,

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sons who aid in preparation of "a false or fraudulent return"); I.R.C. § 6653(b) (civil penalty where underpayment of tax "required to be shown on a return is due to fraud"). Difficult questions may arise as to whether a "return" has been filed in "tax protester" cases, where a document is submitted that on its face does not purport to furnish the information necessary to compute a tax liability. Compare, *e.g.*, *United States* v. *Stout*, 601 F.2d 325, 328 (7th Cir.), cert. denied, 444 U.S. 979 (1979) (blank Form 1040 accompanied by assertions of Fifth Amendment privilege is not a "return") and *United States* v. *Edelson*, 604 F.2d 232, 234 (3d Cir. 1979) (Form 1040 listing income in "constitutional dollars," *i.e.*, dollars backed by silver, is not a "return") with *United States* v. *Long*, 618 F.2d 74, 75-76 (9th Cir. 1980) (Form 1040 with zeros inserted in all available spaces is a "return"). The "tax protester" cases have no application here, for petitioners' original returns, while inaccurate, purported on their face to furnish information necessary to compute the tax.

was a "return" for limitations purposes, so that the taxpayer's filing of an amended return did not start a new limitations period running. The Court stated that "[p]erfect accuracy or completeness is not necessary to rescue a return from nullity, if it purports to be a return, is sworn to as such * * * and evinces an honest and genuine endeavor to satisfy the law." 293 U.S. at 180.

Here, the taxpayers' original returns similarly purported to be returns, were sworn to as such, and appeared on their face to constitute genuine endeavors to satisfy the law. And while petitioners' original returns were not, in fact, honest, one cannot infer from *Zellerbach* the answer to a question that was not before the Court in that case: whether a purported return that does *not* constitute an honest attempt to satisfy the law is, without more, "not a return." Indeed, elementary logic teaches that the contrapositive of a hypothesis is not necessarily true.[22]

2. The language and structure of the Code likewise refute petitioners' contention that a fraudulent filer's amended return becomes, in view of his origi-

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[22] The other decisions of this Court cited by petitioners on this point (B. Br. 22-26; D. Br. 13-15) are likewise inapposite. In *Florsheim Brothers Drygoods Co.* v. *United States*, 280 U.S. 453 (1930), the Court held that a "tentative return" did not start the running of the statute of limitations since it did not contain, and did not purport to contain, sufficient information to allow the Commissioner to compute and assess the tax. Here, by contrast, petitioners' returns on their face set forth an asserted basis for computing their tax, even though the information set forth was inaccurate. *Germantown Trust Co.* v. *Commissioner*, 309 U.S. 304 (1940), merely held that a submission containing the information necessary to compute the tax, but on the wrong form, constituted a "return" sufficient to start the running of the statute of limitations.

nal return's null status, "the return" for purposes of Section 6501(a). The Code itself neither requires the taxpayer's filing nor mandates the Commissioner's acceptance of amended returns.[23] As this Court pointed out in *Hillsboro National Bank* v. *Commissioner*, No. 81-485 (Mar. 7, 1983), slip op. 8 n.10, "it is settled that the acceptance of [an amended return] after the date for filing a return is not covered by statute but [is] within the discretion of the Commissioner." See, *e.g.*, *Koch* v. *Alexander*, 561 F.2d 1115, 1117 (4th Cir. 1977) (per curiam); *Miskovsky* v. *United States*, 414 F.2d 954, 955 & n.4 (3d Cir. 1969) (citing cases). To be sure, the Treasury Regulations do provide for the filing of amended returns in certain situations, and specific forms are furnished by the Internal Revenue Service for this purpose.[24]

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[23] As petitioner Deleet notes (D. Br. 21, 32 n.13), the Code in several places acknowledges the existence of amended returns. See, *e.g.*, I.R.C. § 6213(g)(1) (providing that "return" for purposes of assessing tax due upon correction of mathematical errors includes any return, statement, or list and "any amendment or supplement thereto * * *"); I.R.C. § 6103(b)(1) (providing that "return" for purposes of confidentiality and disclosure provisions includes "any amendment or supplement" to a return). But the Code nowhere requires or explicitly provides for a taxpayer's filing of amended returns.

[24] Treas. Reg. § 301.6402-3(a) provides that an amended return (in lieu of Form 843, entitled "Claim") may be filed where the taxpayer seeks a refund of tax erroneously paid. Conversely, if a taxpayer later ascertains that income was improperly omitted or a deduction improperly claimed in a prior taxable year, the Regulations provide that he "should" file an amended return and pay the additional tax due unless the statute of limitations has run. Treas. Reg. §§ 1.451-1(a), 1.461-1(a)(3)(i). These Regulations do not *require* the filing of amended returns.

But while an amended return may constitute *a* return for a taxable year, it does not follow that it therefore becomes "the return" for purposes of Section 6501(a). The Tax Court noted as early as 1924 that the use of the definite article in the predecessor of that section indicates Congress's intention that only one return—viz., the first return filed—would be of operative significance for any tax year. *National Refining Co.* v. *Commissioner*, 1 B.T.A. 236 (1924). See also *Evans Cooperage, Inc.* v. *United States*, 712 F.2d 199, 204 (5th Cir. 1983) (rejecting argument that amended return should be regarded as "the return for the taxable year" for purposes of Section 6655(b)(1), governing penalty for failure to pay estimated tax).

In sum, nothing in the language of the statute, the structure of the Code, or the decided cases supports petitioners' contention that fraudulent returns are "nullities" for statute-of-limitations purposes. The reason that fraudulent returns lie outside the scope of Section 6501(a) is not that they are not "returns" within the meaning of that section. The reason, rather, is that they are "false or fraudulent returns" within the meaning of Section 6501(c)(1).

D. A nonliteral reading of the statute cannot be justified by the asserted need to avoid disparate treatment as between fraudulent filers and fraudulent non-filers

Petitioners contend (B. Br. 18-20; D. Br. 15-17, 26) that a literal reading of Section 6501(c) produces a "disparity in treatment" between taxpayers who, in the first instance, file a fraudulent return and those who, in the first instance, fraudulently fail to file any return at all. In petitioners' view (D. Br. 44), such a disparity unjustifiably "elevat[es] one form of tax fraud over another." This argument,

accepted by the Tenth Circuit in *Dowell* (614 F.2d at 1265-1266), was properly rejected by the court of appeals here (B. Pet. App. 9a-10a & n.6).

As noted above, Section 6501(c)(3) provides that, "[i]n the case of failure to file a return, the tax may be assessed * * * at any time." It is now settled that this section ceases to apply once a return has been filed for a particular year, regardless of whether that return is filed late and regardless of whether the taxpayer's failure to file a timely return in the first instance was due to fraud. See *Bennett* v. *Commissioner*, 30 T.C. 114 (1958), acq., 1958-2 C.B. 3. Accord, Rev. Rul. 79-178, 1979-1 C.B. 435. Citing this principle, the *Dowell* court reasoned (614 F.2d at 1265-1266) that the filing of a nonfraudulent *amended* return, in the wake of a fraudulent original filing, is essentially analogous to the filing of a nonfraudulent *late* return, in the wake of a fraudulent failure to file. The Tenth Circuit accordingly concluded that Section 6501 should be read to produce the same statute-of-limitations result in each situation.

As the court of appeals in the present cases correctly noted, however, "Congress provided a clear indication" on the face of the statute that it *did* intend different statute-of-limitations results in these two situationts (B. Pet. App. 10a n.6). Congress's intention is evident in the language of both Section 6501(c) and Section 6501(a).

1. Section 6501(c)(3) applies "[i]n the case of failure to file a return." The section does not speak of failure to file a *timely* return,[25] nor does it speak

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[25] Compare I.R.C. § 6651(a)(1) (providing civil penalties for failure "to file any return * * * on the date prescribed therefor * * *"); I.R.C. § 7203 (providing criminal penalties for willful failure to make returns or furnish information "at the time or times required by law or regulations * * *").

of a *fraudulent* failure to file. Thus, it becomes literally inapplicable once a return has been submitted, regardless of whether the return is filed late, and regardless of whether the failure to file a timely return was due to fraud.

Section 6501(c)(1), by contrast, applies "[i]n the case of a false or fraudulent return." As noted above (pp. 13-14, *supra*), that section by its terms continues to apply indefinitely once a fraudulent return has been filed. The fact that a fraudulent filer subsequently submits an amended return, or otherwise cooperates in a civil or criminal investigation, does not make the case any less a "case of a false or fraudulent return." Accord, *Woolf* v. *United States*, 578 F.2d 1103, 1105 (5th Cir. 1978). In short, although Sections 6501(c)(1) and 6501(c)(3) are similar in some respects, they lead ineluctably to different results in the two situations posited by petitioners.[26]

2. If Section 6501(c) leaves any doubt whether Congress intended that different statute-of-limitations consequences should govern fraudulent and late-filed returns, that doubt is eliminated by Section 6501(a).

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[26] As petitioner Deleet notes (D. Br. 17-19), the provisions now set forth in Sections 6501(c)(1) and 6501(c)(3) were contained in a single subsection from 1921 until the 1954 recodification of the tax laws. See, *e.g.*, Internal Revenue Code of 1939, ch. 2, § 276(a), 53 Stat. 87 ("In the case of a false or fraudulent return with the intent to evade tax or of a failure to file a return the tax may be assessed * * * at any time"). The 1918 version of the statute did not mention failure to file returns; it provided an unlimited assessment period only in the case of false or fraudulent returns. Revenue Act of 1918, ch. 18, § 250(d), 40 Stat. 1083. Nothing in the legislative materials suggests that Congress intended the two provisions to operate in identical fashion. And the language Congress used clearly indicates that it did not.

That Section specifically provides that the normal three-year assessment period begins to run on the date "the return was filed (whether or not such return was filed on or after the date prescribed) * * *." Section 6501(a) does not inquire into why a return was filed late; it applies whether the failure to file a timely return was innocent or negligent, excusable or fraudulent.

Here again, the language of the statute inescapably produces different results in the two situations posited by petitioners. Section 6501(a) on its face provides that the filing of a nonfraudulent *late* return will start the general three-year limitations period running.[27] The Section just as plainly contains nothing to suggest that the filing of a nonfraudulent *amended* return will have this effect.

3. As petitioner Deleet notes (D. Br. 35-40), cases of fraudulent failure to file give rise to some of the same investigatory and enforcement problems as do cases of fraudulent returns. Arguably, therefore, the "tax policy" considerations discussed above (see pp. 20-25, *supra*) would support giving the Commissioner an unlimited period of assessment in both situations, regardless of the taxpayer's subsequent efforts to set the record straight. For whatever reason, however,

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[27] The parenthetical phrase in Section 6501(a) (quoted above) was added in 1954; its predecessor provided simply that the tax "shall be assessed within three years after the return was filed." Internal Revenue Code of 1939, ch. 2, § 275(a), 53 Stat. 86. Courts construing the earlier version uniformly held that a late-filed return was "the return" for the taxable year, and that the normal limitations period began to run on the date such return was submitted. *E.g., Automobile Club* v. *Commissioner*, 353 U.S. 180, 186-187 (1957). The addition of the parenthetical phrase in 1954, therefore, merely restated the law.

Congress has chosen not to do so,[28] and has manifested that decision in unambiguous statutory language.

CONCLUSION

The judgment of the court of appeals should be affirmed in both No. 82-1453 and No. 82-1509.

Respectfully submitted.

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[28] The point is not that Congress discretely afforded different limitations treatment to two arguably similar categories of fraudulent conduct. Congress simply did not distinguish, for limitations purposes, between fraudulent and nonfraudulent failures to file; rather, it placed all cases of "failure to file a return" in a single category under Section 6501(c)(3). In Section 6501(c)(1), by contrast, Congress explicitly and separately addressed the problem of fraudulent returns, providing that, where fraud is involved, the tax may be assessed "at any time."

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

Section 6501. Limitations on assessment and collection

(a) General rule

Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

* * * * *

(c) Exceptions

(1) False return

In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

(2) Willful attempt to evade tax

In the case of a willful attempt in any manner to defeat or evade tax imposed by this title (other than tax imposed by subtitle A or B), the tax may

be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(3) No return

In the case of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

* * * * *

(e) Substantial omission of items

Except as otherwise provided in subsection (c)—

(1) Income taxes

In the cases of any tax imposed by subtitle A—

(A) General rule

If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed. * * *

* * * * *

Section 6503. Suspension of running of period of limitation

(a) Issuance of statutory notice of deficiency

(1) General rule

The running of the period of limitations provided in section 6501 or 6502 on the making of assessments or the collection by levy or a proceeding in court, in respect of any deficiency as defined in section 6211 (relating to income, estate, gift and certain excise taxes), shall (after the mailing of a notice under section 6212(a)) be suspended for the period during which the Secretary is prohibited from making the assessment or from collecting by levy or a proceeding in court (and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Tax Court, until the decision of the Tax Court becomes final), and for 60 days thereafter.

(2) Corporation joining in consolidated income tax return

If a notice under section 6212 (a) in respect of a deficiency in tax imposed by subtitle A for any taxable year is mailed to a corporation, the suspension of the running of the period of limitations pro-

vided in paragraph (1) of this subsection shall apply in the case of corporations with which such corporation made a consolidated income tax return for such taxable year.

(b) Assets of taxpayer in control or custody of court

The period of limitations on collection after assessment prescribed in section 6502 shall be suspended for the period the assets of the taxpayer are in the control or custody of the court in any proceeding before any court of the United States or of any State or of the District of Columbia, and for 6 months thereafter.

(c) Taxpayer outside United States

The running of the period of limitations on collection after assessment prescribed in section 6502 shall be suspended for the period during which the taxpayer is outside the United States if such period of absence is for a continuous period of at least 6 months. If the preceding sentence applies and at the time of the taxpayer's return to the United States the period of limitations on collection after assessment prescribed in section 6502 would expire before the expiration of 6 months from the date of his return, such period shall not expire before the expiration of such 6 months.

(d) Extensions of time for payment of estate tax

The running of the period of limitation for collection of any tax imposed by chapter 11 shall be suspended for the period of any extension of time for payment granted under the provisions of section 6161(a)(2) or (b)(2) or under the provisions of section 6163 or 6166.

* * * * *

Section 6653. Failure to pay tax

* * * * *

(b) Fraud

If any part of any underpayment (as defined in subsection (c)), of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. * * *

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Nos. 82-1453 and 82-1509

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ERNEST BADARACCO, SR., *et al.*,
Petitioners,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DELEET MERCHANDISING CORP.,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER, DELEET MERCHANDISING CORP.

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Question Presented

Does the subsequent filing of a complete and honest amended return start the running of the statute of limitations provided in Section 6501(a) as Petitioner contends, or does the filing of an allegedly fraudulent return give the Government the right in perpetuity to assess deficiencies and penalties—no matter what remedial steps are taken by the taxpayer—as the Government contends?

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UNITED STATES OF AMERICA,

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On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF FOR PETITIONER, DELEET MERCHANDISING CORP.

POINT I

Subsection 6501(c)(1) and Subsection 6501(c)(3) are in *pari materia*—both Subsections are *exceptions* to the three year statute of limitations of Subsection 6501(a) of the Code.

> "Our Constitution is in actual operation; everything appears to promise that it will last; but in this world nothing is certain but death and taxes."
>
> Benjamin Franklin[1]

Ben Franklin notwithstanding, the Government would have this Court hold that only death is a certainty. The Government submits that once a taxpayer has filed a false or fraudulent tax return it has the statutory authority to indefinitely suspend the assessment and collection of taxes even if that suspension extends beyond the life of the taxpayer[2]; and that neither the filing of a proper amended return nor any other act by the taxpayer, no matter what the circumstances, can place any time limitation on this asserted governmental prerogative to assess the tax on a date of its choosing. Congress certainly did not intend the result urged by the Government.

When Congress adopted the Revenue Act of 1918, it provided that:

> "Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made . . . In the case of false or fraudulent returns, the amount of tax due may be determined at any time after the re-

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[1] Benjamin Franklin in a letter to M. Leray—(1789) Bartlett's Familiar Quotations, 15th ed. (1980).

[2] See Petitioner's Br. p. 23.

> turn is filed, and the tax may be collected at any time after it becomes due." Revenue Act of 1918, ch. 18 § 250(d), 40 Stat. 1083.

It is clear from the express language of this statute that Congress intended to create an *exception* to its general statute of limitations in the case where fraudulent returns were filed. The use of the phrase "at any time" did not create an open ended statute of limitations but emphasized the fact that an *exception* was being made for a fraud case. By the Revenue Act of 1921, Congress extended the *exception* to the statute of limitations to encompass the situation where the taxpayer failed to file any return at all. Thus, the Revenue Act of 1921 provided:

> "[I]n the case of a false or fraudulent return with intent to evade tax, *or* of a failure to file a required return, the amount of tax due may be determined . . . at any time after it becomes due. . . ." (Emphasis added). Revenue Act of 1921, ch. 136, § 250(d), 42 Stat. 265.

This Congressional legislation has remained without substantive change through the Internal Revenue Code of 1954 and the amendments thereto.

Although there is no legislative history which expressly sets forth the specific intent of Congress with respect to the enactment of the aforesaid provisions, Petitioner submits that when considered in conjunction with the accepted proposition that the American system of taxation depends primarily upon self-assessment by a taxpayer in informing the Government of his own tax liability (See, Mertens' Law of Federal Income Taxation, § 49.02), Congress' intent becomes quite apparent. Simply put, when the taxpayer files a "return", be it amended or original, which "evinces an honest and genuine attempt to satisfy the law" *Zellerbach Paper Co.* v. *Helvering*, 293 U.S. 172, 180 (1934), Congress initially mandated that the Gov-

ernment shall have five years in which to assess any tax due. Revenue Act of 1918, ch. 18, § 250(d). Congress has shortened that period to the present three year period of limitation of Subsection 6501(a) of the Code.[3] Thus, Congress expressly determined that when the taxpayer has given the Government complete information as to his income, deductions and credits, three years is ample time for the Government to make its determination as to any additional tax which may be due. Subsection 6501(a) of the Code. When the taxpayer fails to provide the Government with such information, then the three year limitation period imposed upon the Government does not begin to run.

The rationale for this distinction is apparent on its face. When the taxpayer files a false return, there is nothing about the return which sets it apart from the thousands of other tax returns which the Government receives which would lead the Government to believe that it is false and that the information contained therein is incomplete or erroneous. Therefore, when the taxpayer has not given the Government the complete and accurate information which the Government requires in order to determine the appropriate tax due, it would be unreasonable to subject the Government to any time constraints with respect to the assessment of additional taxes. Thus, Congress created and retained the exception to the general statute of limitations. Subsection 6501(c)(1) of the Code.

Likewise, in the case of a non-filer (particularly in 1921, before the advent of the computer age), the Government is also hampered, absent any tax return, in its ability to determine the amount of tax which may be owed. Consequently, in the case of a non-filer, as in the case of the filing of a fraudulent return, the Government is, by reason of the exception created by Congress, not subject to the general three year period of limitation. Subsection 6501(c)(3) of the Code.

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[3] The term "Code", unless otherwise indicated, is a reference to the Internal Revenue Code of 1954, as amended.

In both instances, it is the acts of the taxpayer that have placed the Government at a substantial disadvantage with respect to the determination and imposition of taxes, and it is only reasonable that Congress should see fit to deprive that taxpayer of the benefits of the three year limitation period. On the other hand, when the taxpayer has supplied the Government with complete and proper information as to his income, deductions and credits, reason and logic dictate that the Government must now proceed in accordance with Congressional mandate and seek to assess and collect any tax due within three years of the date of its receipt of required information—whether such information is supplied either by way of an "amended return" or by a "delinquent return". In *Bennett* v. *Commissioner*, 30 T.C. 114 (1958), acq., 1958-2 C.B. 3; Rev. Rul. 79-178, 1979-1 C.B. 435, the Tax Court, construing the provision of Subsection 6501(c)(3) of the Code, so held. In the words of the Court:

> "For, once a nonfraudulent return is filed, putting the Commissioner on notice of a taxpayer's receipts and deductions, there can be no policy in favor of permitting assessment thereafter at any time without limitation. We think that the statute of limitations begins to run with the filing of such returns." 30 T.C. at 123-13.

Petitioners submit that, if this Court accepts the view of both the Tenth and the Third Circuit Courts of Appeals that Subsection 6501(c)(1) and Subsection 6501(c)(3) are in *pari materia*, the Tax Court's holding in *Bennett*, although not binding precedent of this Court, should be viewed as dispositive of the issues. The Court in *Bennett* held that the three year statute of limitations set forth in Subsection 6501(a) is applicable in a case where a taxpayer fraudulently and with intent to evade the tax failed to file a tax return, and where after being the subject of a Government investigation the taxpayer subsequently filed a return. It is illogical and unreasonable to hold that a taxpayer who fraudulently fails to file a

return, and who subsequently files a proper return is entitled to the benefit of the three year statute of limitations, but a taxpayer who files a fraudulent return, and who subsequently files a proper amended return is not[4]. There can be no justification for favoring one errant taxpayer who has failed to meet his obligation over another, or for providing that the consequence of one form of noncompliance can be limited by supplying the Government with accurate information as to income, deductions and credits, while the consequences of a different failure to comply cannot be so limited.

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[4] After stating that is not relevant to the issue before this Court, the Government questions Petitioner's statement that the filing of its amended return was done "voluntarily and without any coercion from the Government whatsoever" (G. Br., p. 4 n. 4). It does so by reference to a clearly self-serving report prepared by an IRS agent in 1977 referring to events which occurred four years prior to the date of the report. Defendant's Answer to Plaintiff's First Set of Interrogatories, Ex 1, Appendix A p. 1a *et seq.* The portions of the report referred to by the Government relate to statements allegedly made by counsel for Petitioner at a meeting at which the author of the report was not present, nor is the source of the agent's knowledge disclosed. Not only is the report inaccurate but its probative value is questionable. It should be noted, however, that the report does show that Martin Windell—who was not an officer of the Petitioner at the time that the amended returns were filed—was the moving force behind the alleged acts of tax fraud (See Appendix A, p. 5a), and that the corporation and its other officers were at best guilty of negligence but not of criminal fraud (Appendix A, p. 5a). The report does make it clear that there was no Government investigation or other activities relating to affairs of the Petitioner prior to the time it filed its amended return (Appendix A, p. 2a). The Petitioner was not subject to "any coercion from the Government whatsoever" and as between the Petitioner and the Government, the filing of an amended tax return was clearly a "voluntary" act on the part of the Petitioner. (Although the report is referred to at length by the Government, it did not request its inclusion in the Joint Appendix nor see fit to include the document as part of the Appendix to its Brief. Petitioner has included the relevant portions thereof as Appendix A.)

In its Brief, the Government never squarely addresses the *Bennett* decision nor the implication of that decision on the issues presented herein. Rather, it erroneously contends that "[N]othing in the legislative materials suggests that Congress intended the two provisions to operate in identical fashion. And the language Congress used clearly indicates that it did not". (G. Br. 34, n. 26). This statement overlooks the fact that Congress in the 1921 Code, addressing itself for the first time to the question of failure to file, enacted the provision relating to failure to file within the same sentence as that dealing with the filing of a false return (Revenue Act of 1921, ch. 136 § 250(d), 42 Stat. 265). All subsequent enactments followed the same pattern until the 1954 Code, when the provisions were separated into two sentences in the same section of the Code. This change was made without substantive comment by Congress. Petitioner suggests that there can be no greater showing of Congress' intent that both subjects be dealt with in the same manner.

The *Bennett* decision and the Government's own Revenue Ruling (Rev. Rul. 79-178, 1979-1 C.B. 435) belie its present contention that fraudulent non-filers who subsequently file what the Government describes as "delinquent returns" do not receive preferential treatment above that afforded the taxpayer who files a fraudulent return and subsequently files a complete and accurate "amended return". The *Bennett* taxpayer was indisputedly engaged in the perpetration of tax fraud. He was not a taxpayer, as the Government's brief suggests, who innocently or negligently failed to file a return on its due date and subsequently voluntarily filed a "delinquent return". (G. Br. p. 35). The Government's Revenue Ruling which followed the holding in *Bennett* states that it was directed toward the following issue:

> "Can tax be assessed at any time under section 6501 (c)(1), (2) or (3) of the Internal Revenue Code in a case where the taxpayer did not timely file an income tax return in a *willful attempt to evade* income

> tax but, after an Internal Revenue Service investigation began, filed a correct, but delinquent, return?" (Emphasis added)

The Government concluded after some analysis that:

> "The tax cannot be assessed at any time under section 6501(c) of the Code, but must be assessed within the three-year period of limitations provided in section 6501(a) (June 1, 1979). 26 CFR 301.6501 (c)-1: Exceptions to general period of limitations on assessment and collection". Rev. Rul. 79-178, 1979-1C.B. 435.

Notwithstanding the foregoing, the Government, without providing any logical explanation or distinction, now urges a contrary holding with respect to a taxpayer who purportedly sought to evade the payment of taxes by filing a fraudulent return and who subsequently filed an accurate amend d return. The Government in its Brief denies that its positions are inconsistent. But the mere stating of the Government's contention is to expose the illogical and unreasonable nature of that position. The Government's position is predicated not on the issue of taxpayer's "intent to defraud", but rather on the manner in which the taxpayer sought to carry out that intent. It is the Government's contention that if the taxpayer, who intends to defraud the Government, carries out his fraudulent intent by not filing a tax return, he is afforded the benefit of the statute of limitations, provided he files his return *at any time*. If, however, the taxpayer who intends to defraud the Government, carries out his fraudulent intent by filing a false return, he is never afforded the benefit of the statute of limitations, even if he voluntarily files a complete, accurate non-fraudulent amended return. Such a proposition is illogical and inconsistent with the rational statutory scheme enacted by Congress.

POINT II

The construction urged by the Government will invite abuse—preventing the taxpayer from contesting arbitrary disallowances by the Government.

This Court has stated that statutes of limitations are enacted in a sense of fairness to prevent claims from being suspended over a period of time "until evidence has been lost, memories have faded and witnesses have disappeared". *Burnett v. New York Central R. Co.*, 380 U.S. 424, 428 (1965). The policy arguments urged by the Government run contrary to this generally accepted principle.

When, on August 9, 1973 the Petitioner herein filed its amended returns for the taxable years 1967 and 1968, it paid the tax due as reflected on the returns. These returns are conceded by the Government to be non-fraudulent amended returns. With respect to such returns, the Government, in addition to assessing a fraud penalty under Code Subsection 6653(b), also seeks to collect additional taxes based on the Government's resulting disallowance of certain deductions claimed by the Petitioner. (JA 71A; G. Br. 4; A. 5a). While the burden of proving that the initial returns filed in 1967 and 1968 were fraudulent may rest with the Government, once the amended returns were filed and the Government disallowed certain of the deductions claimed on these returns, the burden of proving the propriety of these deductions lies not with the Government but with the Petitioner. *Richard P. Rosenberg* v. *Commissioner*, (Dec. 32,417 (M)), 33 T.C.M. (CCH) 31 (1974), aff'd., 519 F.2d 1400 (4th Cir. 1975); *Mike M. and Helen Grancich* v. *Commissioner*, (Dec. 35,026 (M)), 37 T.C.M. (CCH) 424 (1978), aff'd., unpublished opinion 4-30-81 (9th Cir. 1981); *Thelma Blevins* v. *Commissioner*, (Dec. 21,157 (M)), 14 T.C.M. (CCH) 840 (1955), aff'd., 238 F.2d 621 (6th Cir. 1955). In December, 1979, the Government, having reviewed the complete and fully informative amended returns filed by the Petitioner in 1973, disallowed certain deductions which relate solely to the business operations of the Petitioner. It is now the Pe-

titioner's burden to establish and prove the propriety of those deductions. By reason of the Government's unjust delay in seeking to assess and collect additional taxes from Petitioner, Petitioner will be required, more than ten years after the filing of its amended returns, to present evidence (*which may now be lost*) and witnesses (*whose memories may have faded or have disappeared*) to verify business deductions and expenditures it made in 1967 and 1968.

To place the Petitioner in such a position is contrary to any concept of fairness and creates a fertile breeding ground for Government abuse. If this Court accepts the position urged by the Government that it is free to assess the tax "at any time", a taxpayer could be required to meet its burden of establishing the propriety of its business deductions not 10 years after the filing of an amended return, but, if the Government so chooses, 15 years, 20 years or even 30 years after the date on which the expenses were incurred.

The Government states that "Petitioner's fear that the Government will abuse the unlimited assessment penalty is unrealistic". (G. Br. 27). However, the record in this case demonstrates that Petitioner's fear of Government abuse is not unrealistic, but quite real. There is absolutely no justification for the Government to have waited over six years after Petitioner had filed its amended returns to have made its assessment.[5]

The substantial prejudice to the Petitioner as a result of the Government's inaction is obvious, and cannot be justified by any reference to some vague policy con-

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[5] Petitioner filed its amended return on August 9, 1973. The Government's internal report indicates that the Intelligence Division granted permission to the Civil Division to proceed civilly against the Petitioner in early 1975, even though it recommended criminal proceedings against a former officer of Petitioner, Mr. Martin Windell. Moreover, the report further indicates that the criminal investigation of this former officer was concluded by the IRS on July 26, 1976 (Appendix A, p. 6a).

sideration. Once a taxpayer has filed an amended return and has given the Government all of the information that the Government needs to assess the tax, by Congressional mandate the Government must take affirmative action within three years of the filing of that return. Subsection 6501(a) of the Code. To remove the time restraints which Congress placed on the Government in which it must move to assess the tax is not only unreasonable but is also highly prejudicial to the taxpayer and contrary to the general principles of statutes of limitations.

Were this Court to accept the proposition urged by the Government—that it has an open ended time frame in which to assess taxes and determine deficiencies—it would place a burden on a taxpayer that could not possibly be met. For unless the taxpayer can find some way of preserving evidence forever; freezing and maintaining the memories of those persons having knowledge of the relevant facts; and providing for the immortality of his accountants and others whose testimony would be vital to establishing the propriety of any business deductions he has claimed—such a task is impossible for any taxpayer—the taxpayer must concede any disallowance which the Government chooses to make. Therefore, granting the Government the power to delay the assessment of tax until it and it alone decides to act would also grant the Government the power to act with impunity with respect to the disallowance of any deduction claimed by the taxpayer.

The continuing passage of time diminishes the taxpayer's ability to dispute any disallowance made by the Government. Thus, the longer the Government delays in acting to assess the taxes it claims are due, the less the taxpayer, who bears the legal burden of proving his deduction, is able to sustain that burden! To place such power in the hands of the taxing authority gives it ability to pressure the taxpayer to settle all pending and collateral disputes, irrespective of the merits of the

taxpayer's opposition. This certainly cannot be an acceptable rule of law in a tax system based on the precepts of voluntary disclosure, fairness and the assertion and prosecution of viable defenses; nor does the bridling of this potential abuse of power restrain or undermine the efficacy of the federal tax system.

POINT III

The need to foster voluntary self-reporting and re-evaluation of tax returns outweighs the Government's policy arguments.

The Government contends that there are sound policy and practical considerations in the case of the filing of a fraudulent tax return which warrant its having an unlimited period of time in which to assess any additional tax, notwithstanding filing by the taxpayer of an amended tax return.

The first of these considerations set forth in the Government's Brief is that fraud cases are ordinarily more difficult to investigate than routine tax cases and that the filing of an "amended return" does not "substantially diminish the amount of effort required to verify the correct tax liability". (G. Br. 21). While recognizing the Government's contention that tax fraud cases may be more difficult to investigate, Petitioner submits that the filing of an "amended tax return" is of substantial value to the Government, for not only does the filing of an amended return aid the Government in proving its case of fraud, but it also lessens the number of hours necessary for the Government to verify the information provided. By comparing a correct and complete amended tax return with the original fraudulent return, the Government can easily focus on those areas of the taxpayer's activities in which a fraud has been perpetrated, thereby narrowing the scope of its investigation and

contracting the number of hours in investigative work required to gain the evidence the Government will need to meet its burden of proof.

Secondly, the Government contends that the filing of the amended return "does not fundamentally change the nature of a tax fraud investigation. Amended returns, however accurate they may ultimately prove to be, come with no greater guarantee of trustworthiness than other submissions". (G. Br. 21). If by this statement the Government implies that the filing of an "amended return" may of itself be of little value because it may be false and fraudulent, such a contention, even if true, is not germane to the issue before this Court. If the amended return proves to be false and fraudulent in any respect, then the exception to the statute of limitations (Code Subsection 6501(c)(1)) remains operative and the Government is not under any time restraint with respect to assessing any tax which may be due. It is only when the taxpayer has filed a non-fraudulent amended tax return that the three year statute of limitations begins to run. If the Government is suggesting that it needs more than three years to verify the correctness of the information set forth in the amended return, Petitioner submits that Congress has seen fit to deny the Government such a luxury. Congress has expressly limited the Government to a three year period in which to determine the accuracy and propriety of non-fraudulent tax returns and the assessment of the tax due thereunder. Code Subsection 6501(a). There can be no justification for the Government's claim that it needs more time to verify the information contained in an amended return than it needs to verify information contained in an original return. The verification procedure should be the same and both are subject to the Congressional mandate that the process be completed within three years of the filing of the return.

Another policy consideration which the Government alludes to in its brief is the fact that, unlike other civil tax cases, in a false filing case the burden of proof with re-

spect to the issue of fraud rests with the Government[6]. In this regard, the Government states that while the amended return "may constitute an admission of substantial underpayment, it will not ordinarily constitute an admission of fraud". (G. Br. p. 22). Armed with an admission by the taxpayer that it has substantially understated its income, the Government is certainly in a much better position of meeting its burden of proof on the question of fraud than it otherwise would have been in the absence of such an admission. Moreover, the Government's unsupported contention that "[O]nce a criminal referral has been made, the Commissioner will often find it difficult, if not impossible, to complete his civil investigation within the normal three-year period, and the taxpayer's filing of an amended return will not make any difference in this respect" (G. Br. p. 23) is simply unrealistic. This statement presupposes that the amended return has been filed at the time of or prior to the referral of the matter to the Criminal Division, which may or may not be the case. Further, it ignores the fact that prior to the referral to the Criminal Division the Government must have uncovered at least what it perceives to be a *prima facie* case of tax fraud so as to warrant such a referral. Moreover, at the time that the Government's Criminal Division seeks an indictment of the taxpayer based upon a charge of tax fraud the investigation must have progressed to the point that the Government honestly believes that it has sufficient evidence to establish the taxpayer's guilt "beyond a reasonable doubt". If this is not the case, the Criminal Division cannot proceed to seek an indictment of the taxpayer, for to do so would be contrary to the high standard of con-

[6] The same burden of proof rests with the Government in a case of a fraudulent non-filing of a tax return. Yet the Government acquiesced in the decision of *Bennett* v. *Commissioner*, which held that the three year statute of limitations was applicable to a tax return filed subsequent to Government action. Petitioner submits that the Government's prior inconsistent position points up the frivolous nature of this alleged policy argument.

duct imposed upon the Government in cases of criminal prosecution. *Berger* v. *United States*, 295 U.S. 78 (1935). At such time as the Government seeks to indict the taxpayer, it undoubtedly will have completed its criminal investigation. Thus, the Government's claim that if it is required to assess civil tax liabilities within three years of the filing of the amended return it would not have ample time within which to discharge its responsibility to enforce the criminal tax laws, is totally without merit.

This fact is amply demonstrated by an examination of the underlying facts of the cases which have been cited to this Court as being relevant to these issues herein. In *Dowell, Britton, Nesmith,* and *Badaracco,* the Government had more than sufficient time between filing of the amended return and the running of the three year statute of limitations in which to complete its criminal investigation and file its civil Notice of Deficiency[7]. However, it did not choose to act with dispatch.

	Amended Return Filed	*Indictment*	*Statutory Notice of Deficiency Issued*
[7] *Deleet* v. *United States*	8/09/73	NONE*	12/14/79
Badaracco v. *Commissioner*	8/17/71	11/71	12/21/77
Dowell v. *Commissioner* 614 F. 2d 1263, 1264 (10th Cir. 1980)	11/25/68	5/07/70	12/11/74

(Table continued on following page)

* Martin Windell, a former officer of Deleet, who had left the company several years prior to the filing by Deleet of the amended returns on 8/9/73, was the subject of a criminal proceeding. The investigation of Mr. Windell's affairs was completed by the IRS on 7/26/76 (Appendix A, p. 6a) and all criminal proceedings were completed in May of 1976. (G. Br., p. 5, n.5).

Petitioner submits that the alleged risks which the Government claims it might incur in pursuing a parallel civil and criminal investigation, as outlined in the Internal Revenue Manual (G. Br. 24), if they in fact exist, are not of such magnitude as to justify the position urged by the Government with respect to the imposition of tax liability. These risks as set forth in the Government's Brief are as follows: (1) possible premature disclosure of evidence to a defendant; (2) claims of harassment by potential criminal defendants; (3) seizure of funds in a civil case that might deny a defendant the criminal attorney of his choice; (4) difficulties with witnesses where the civil trial precedes the criminal trial; and (5) difficulties with the introduction of evidence in a civil case owing to taxpayers' assertion of Fifth Amendment rights.

(1) The Petitioner submits that the possible premature disclosure of evidence to a defendant is no justification for allowing the Government to have an open-ended period in which to proceed civilly with respect to the imposition of civil tax liability. The prejudice to the taxpayer by such a policy clearly outweighs any concern the Government might have with respect to disclosure of evidence. This is particularly true since the Government has the ability to seek protection of the courts

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(Footnote continued from preceding page)

	Amended Return Filed	*Indictment*	*Statutory Notice of Deficiency Issued*
Britton v. *United States* 532 F. Supp. 275, 276 (D. Vt. 1981)	2/06/76	3/15/78	3/19/79
Nesmith v. *Commissioner* 699 F. 2d 712 (1983)	12/73	Criminal Investigation Commenced 1973	12/01/78

to prevent such premature disclosure. *Campbell* v. *Eastland*, 307 F. 2d 478 (5th Cir. 1962).

(2) The claim that parallel investigations might harass potential criminal defendants is unrealistic. Whether the investigation is being conducted on the criminal or civil side neither adds to nor decreases the likelihood of harassment of potential defendants. Moreover, if the Government conducts its investigation in accordance with accepted modes of conduct, there is no danger of it harassing potential parties.

(3) A concern that the seizure of funds in a civil case may deny a criminal defendant an attorney of its choice is easily resolved by the Government's own action. The Government is not obligated, when it files a civil tax deficiency notice, to seize the taxpayer's funds and, if this were truly a concern, the Government can easily proceed on an *ad hoc* basis and exercise restraint when appropriate. To use such an argument to support an open-ended statute of limitations is completely inappropriate.

(4) The concern the Government voices with respect to its difficulty with witnesses in situations where civil cases precede criminal cases may be a real one. But, a taxpayer's and/or a defendant's entitlement to an early resolution of any claim brought against him by the Government, whether that claim is lodged on either the civil or criminal docket, certainly outweighs this concern.

(5) Lastly, the Government claims the difficulty that it may encounter in a civil prosecution where the taxpayer has asserted the Fifth Amendment privilege. Since in a civil case, the Government is entitled to the benefit of a most favorable inference by reason of the taxpayer's assertion of the Fifth Amendment privilege (***Baxter*** v. ***Palmigiano***, 425 U.S. 308 (1976); ***Winterland Concessions Co.*** v. ***Sileo***, 528 F.Supp. 1201 (N.D. Ill. 1981); ***Poplar Grove Pltg. & Ref.*** v. ***Bache Halsey Stuart Inc.***,

465 F.Supp. 585 (M.D. La.), cause remanded, 600 F.2d 1189 (5th Cir. 1979), it is not prejudiced by assertion of a constitutionally protected right. The Government cannot honestly aver that the possible assertion of that privilege justifies its claim of need to permit an open-ended period of time to assert civil claims against a taxpayer, irrespective of the filing of an amended return.

As an additional policy consideration, the Government refers to Subsection 6501(e)(1)(A) of the Code, contending that a person who filed an alleged fraudulent return and subsequently files a corrected amended return should not be placed in a better position than the taxpayer who made substantial but non-fraudulent omissions on his original return. In making this argument, the Government does not address itself to the distinctions raised by Petitioner in its initial brief. (See, Petitioner Br., p. 41, *et seq.*) Essentially, the Government never addresses the proposition that unlike Code Subsection 6501(c)(1), Subsection 6501(e)(1)(A) is not an exception to the general three year statute of limitations contained in Subsection 6501(a) but is rather a self-contained substituted six year statute of limitations, having no relationship to either Subsection 6501(a) or 6501(c). *Klemp* v. *Commissioner*, 77 T.C. 201, 206. Thus, Petitioner submits that the decisions in *Goldring* v. *Commissioner*, 20 T.C. 79 (1953) and *Houston* v. *Commissioner*, 38 T.C. 486 (1962) are not inconsistent with the interpretation of Subsections 6501(c)(1) and (c)(3) which Petitioner puts forth. *Goldring* and *Houston* stand for the proposition that the filing of an amended return does not "relate back" to the original return so as to shorten the Congressionally enacted limitations period of Subsection 6501(e)(1)(A). Petitioner, accepting the proposition that the filing of an amended return would not shorten any limitation period with respect to Subsection 6501(c), submits that the filing of the amended return starts the limitation period enacted by Congress in Subsection 6501(a), to wit, a three-year statute.

The Government's contention that persons who file an allegedly fraudulent return will be placed in a "better" position than those who made substantial but non-fraudulent omissions on their returns ignores the realities of the situation. Extremely drastic penalties may be visited upon a taxpayer who files a fraudulent return or fraudulently fails to file. This is not the case with respect to a Subsection 6501(e)(1)(A) taxpayer. As already noted, the taxpayer who omits 25% of income from his return does have the benefit of a statute of limitations which begins to run the day his return is filed. The taxpayer whose return is subject to Subsection 6501(c)(1) receives no such benefit. It is only when such a taxpayer files an honest and complete amended return that he is to receive the limited benefit of that three year period of limitation provided for in Subsection 6501(a). Moreover, the filing of the amended return does not insulate the taxpayer from the possibility of criminal prosecution nor does it protect the taxpayer from the imposition of the 50% civil fraud penalty. Indeed, the very act of filing amended returns has probably heightened such possibilities.

In sum, the Government's alleged policy considerations are without substance. Furthermore, they must yield to a more basic overriding consideration—the United States tax system is dependent upon *voluntary self-assessment* by its taxpayers and relies on the good faith of each taxpayer to disclose honestly all information relevant to his tax liabilities. *United States* v. *Bisceglia*, 420 U.S. 141, 145 (1975); *Lucia* v. *United States*, 474 F. 2d 565 (5th Cir. 1973). Thus, no policy should be enunciated which deters self-assessment or which punishes a taxpayer, who, like the Petitioner, reexamines his prior act and comes forth and discloses by way of an amended return the information relevant to his tax liability. Neither should a policy be enunciated which places a premium on silence—do not file an amended return, elect to gamble on non-detection—for nothing is to be gained and much is to be lost by the admissions made by way of filing of an amended return.

Congress has adequately provided the most severe sanctions to penalize those taxpayers who initially disregard their duty of self-assessment. Criminal penalties and the 50% civil fraud penalty are adequate to protect the Government's interests. There is no need to assent to the Government's desire to impose penalty upon penalty and condemn the taxpayer to eternal purgatory, where no act of penitence can end the fires of uncertainty, and the Government, unbridled and unrestrained, can dictate the taxpayer's day of judgment. Certainly, such a result cannot be said to have been intended by Congress.

CONCLUSION

Petitioner submits that for the reasons hereinabove stated the filing of an honest amended tax return commences the running of the statute of limitations provided in Subsection 6501(a). Therefore, the decision of the United States Court of Appeals for the Third Circuit should be reversed and the judgment of the United States District Court for the District of New Jersey in favor of the Petitioner should be reinstated and affirmed.

Respectfully submitted,

BARRY I. FREDERICKS
Attorney for Petitioner in Docket No. 82-1509

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655 Madison Avenue
New York, New York 10021
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Of Counsel

[APPENDIX FOLLOWS]

APPENDIX A

Report Transmittal

Total Hours:

264

Name and address of taxpayer:

Deleet Merchandising Corp.
26 Blanchard Street
Newark, N.J. 07105

Related cases or key case:

Graphic Enterprises, Inc.
William and Beatrice Abrams
Martin Windell
Elliot and Evelyn Liroff
Joseph and Barbara Durfel
Richard and Harriet Liroff
Harvey and Minna Kramer

Return form No.:

1120

Years or periods:

1966 to 1972 Inclusive

Agreement:

None

Other information (Unagreed issues and important information not covered in workpapers or report):

Appendix A

The Intelligence Division initiated an investigation of the above taxpayers, when an attorney, Barry Fredericks appeared at the U.S. Attorney's Office, Newark, N.J. and in the presence of Chief John O'Hara and Group Manager, Charles Rapa of the Intelligence Division, he made the following admissions on 1/30/73:

(1) The taxpayers and clients listed above had been skimming receipts and funds for years.

(2) He was making what he felt was a voluntary disclosure and was in the processing of preparing and filing amended returns.

The Intelligence Division advised him that the I.R.S. no longer had a voluntary disclosure policy, that all information furnished would have to be investigated and finally they could not guarantee that his clients would escape prosecution. Mr. Fredericks further stated that one of the individuals not identified at this time had attempted to "shake down" or extort $350,000 from the other 5 individuals and threatened that unless his demands were met that he would "blow the whistle" on the others to the IRS about their flagrant evasion scheme.

Examining Officer:

Charles Lazarus—11/02

Date:

1/12/77

Approved by (Signature of reviewer):

Thomas Pienno, 2/14/77

• • •

Appendix A

On 2/13/73, Fredericks called the Intelligence Division to notify them that he had filed some corporate returns and that the name of the individual whom he identified as the extortionist was Martin Windell.

• • •

Fredericks made numerous allegations about Martin Windell such as the motivation for his alleged extortion, namely to finance his drug habits, high life style, expenses of being a paramor etc. He stated that the Corporations had opened diversionary bank accounts where unreported corporate receipts were deposited and where funds were disbursed to all of the officers. The accountant stated that amended returns were being prepared for all of the entities involved.

• • •

Audit uncovered that amended returns were filed on 2/12/73 with the following adjustments to taxable income:

Debit Commissions Expense—paid to officers.

Credit Gross Receipts for the same amounts.

In effect the first amended return did not increase or decrease taxable income. Examination further disclosed that re-amended corporate returns were filed on 8/9/73, which basically resulted in the following adjustments to taxable income:

Accounts Receivable and Accounts Payable were debited or credited and

Profit and loss items such as gross receipts and purchases were either debited or credited.

Thus, the taxable income of the years 1966 to 1971 inclusive which culminated with the filing of amended and re-amended returns increased or decreased taxable income as disclosed on the Forms 1120.

• • •

R. Mirsky CPA had replaced F. Geller CPA as the co-representative with B. Fredericks. Audit uncovered the following specific issues:

1. Commissions expense—deducted on all of the amended returns. Examination showed that payments were made to the officers in the various years as follows:

a. Checks disbursed directly from the diversionary, secret unrecorded bank accounts.

b. Proceeds of corporate customers' notes collected and deposited in officers' personal checking accounts. These amounts were reported as gross receipts on the amended returns.

c. Personal checks issued by the officers to one another allocating the fruits of some of the unreported income.

The taxpayer claimed through their representatives that the amounts of commissions distributed to the various officers were determined by a complicated formula consisting of 7 pages. No evidence was submitted to substantiate that this formula was in existence back in 1966.

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Appendix A

The representative would not agree to the fraud penalty for the following reasons:

1. Martin Windell's involvement was separate and distinct from the other individuals and corporations. He was guilty of fraud while their clients were guilty of negligence at best.

2. They feel that their clients made a true voluntary disclosure for both civil and criminal purposes.

3. They would agree to the negligence penalty on open years.

• • •

Deleet Merchandising Corp. Years 1966 to 1972 inclusive

The following additional items were adjusted in the years 1970 to 1972 inclusive. The representative stated verbally that although he agreed with these adjustments, he would not sign a partial agreement in order to expedite the closing of the entire case:

(1) Travel and entertainment—1970 to 1972 inclusive. Cash items totalling about $30,000 each year were only substantiated to the amounts listed on unsworn statements on Deleet letterheads.

(2) Purchases—1970 to 1972 inclusive. Purchases included payments to employees which actually represented nondeductible loans which were never repaid. This account also included capital items which were expensed erroneously.

(3) Building repairs—1970 to 1972 inclusive. Audit uncovered also additional capital items which

had been deducted and is being adjusted accordingly.

(4) Gross receipts—1970 only. Examination of one of the diversionary bank accounts Chase Manhattan showed deposits not reported on either the original amended or re-amended returns.

Examination of the years 1966 to 1969 were confined to the fraud issuer, namely civil fraud penalty and commissions deducted determined to be non-deductible corporate distributions taxable as dividends to the recipient officer stockholders.

Inventories did not fluctuate over the years and were accepted as reported on the returns. Submission of the case for civil closing was delayed for numerous reasons as follows:

(1) Permission was granted by Intelligence Division to proceed civilly early in 1975 even though they had recommended criminal prosecution against Martin Windell.

(2) Fraud referral was rejected by Intelligence Division on 10/2/75. Immediately thereafter, permission was requested from Assistant Regional Council, Criminal Tax Philadelphia to proceed civilly against Deleet even though issues discussed would relate to the criminal items against Martin Windell. In their memorandum dated 1/15/76, they requested that civil closing be suspended temporarily.

(3) The closing memorandum on Martin Windell was returned to the Audit Division on or about 7/26/76. The case was returned shortly thereafter by the Review Staff to this examiner.

Appendix A

It is to be noted that a certified transcript has been secured as of 10/11/76 and that for the purposes of this report the taxpayer was only allowed amounts assessed even though amended returns were filed which increased the tax liabilities reported on the various returns.

No. 82-1453-CFX
Status: GRANTED

Title: Ernest Badaracco, Sr., et al., Petitioners
v.
Commissioner of Internal Revenue

Docketed:
February 24, 1983

Court: United States Court of Appeals
for the Third Circuit

Vide:
82-1509

Counsel for petitioner: O'Toole, John J., Fredericks, Barry I.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Feb 24 1983	G	Petition for writ of certiorari filed.
3	Mar 30 1983		Order extending time to file response to petition until April 15, 1983.
5	Mar 31 1983		Order extending time to file response to petition until April 15, 1983.
6	Apr 18 1983		Brief of respondent CIR in support of petition filed. VIDED.
7	Apr 20 1983		DISTRIBUTED. May 12, 1983
8	May 16 1983		Petition GRANTED. The case is consoliated with 82-1509 and a total of one hour is allotted for oral argument. **********
10	Jun 16 1983		Order extending time to file brief of petitioner on the merits until July 30, 1983.
11	Jul 29 1983		Brief of petitioners Ernest Badaracco, Sr., et al. filed.
12	Aug 2 1983		Brief of petitioner Deleet Merchandising Corp. filed. VIDED.
13	Aug 2 1983		Joint appendix filed. VIDED.
15	Aug 17 1983		Order extending time to file brief of respondent on the merits until October 2, 1983.
16	Aug 19 1983		Record filed.
17	Aug 19 1983		Certified original record, two volumes, received from Tax Court.
18	Aug 22 1983		Record filed.
19	Aug 22 1983		Certified copy of C.A. proceedings received.
20	Aug 29 1983		Record filed.
21	Aug 29 1983		Certified original record received.
22	Oct 4 1983		Brief of respondent United States filed. VIDED.
23	Oct 14 1983		CIRCULATED.
24	Oct 24 1983		SET FOR ARGUMENT. Monday, November 28, 1983. (4th case) This case is consolidated with No. 82-1509. (1 hour)
25	Nov 2 1983	D	Motion of petitioners in No. 82-1453 for leave to file motion for divided argument, out-of-time, filed.
27	Nov 14 1983		Motion of petitioners in No. 82-1453 for leave to file motion for divided argument, out-of-time, DENIED.
28	Nov 19 1983	X	Reply brief of petitioner Deleet Merchandising Corp. filed. VIDED.
29	Nov 28 1983		ARGUED.